National Library of Canada
Canadian Theses Service
Ottawa, Canada
K1A 0N4

Bibliothèque nationale du Canada
Services des thèses canadiennes

# CANADIAN THESES

# THÈSES CANADIENNES

## NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30.

## AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30.

THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED

LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE

NL-339 (r. 86/06)

Canada

THE UNIVERSITY OF ALBERTA

# TAX PROBLEMS OF THE VISUAL ARTIST

BY

HELEN C. (HOLLY) TURNER

(C)

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS.

FACULTY OF LAW

EDMONTON, ALBERTA

(FALL, 1986)

Permission has been granted to the National Library of Canada to microfilm this thesis and to lend or sell copies of the film.

The author (copyright owner) has reserved other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without his/her written permission.

L'autorisation a été accordée à la Bibliothèque nationale du Canada de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur (titulaire du droit d'auteur) se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation écrite.

ISBN 0-315-32418-X

THE UNIVERSITY OF ALBERTA

RELEASE FORM

NAME OF AUTHOR: HELEN C. (HOLLY) TURNER

TITLE OF THESIS: TAX PROBLEMS OF THE VISUAL ARTIST

DEGREE: MASTER OF LAWS

YEAR THIS DEGREE GRANTED: 1986

Permission is hereby granted to THE UNIVERSITY OF ALBERTA LIBRARY to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

Helen C. Turner

11608 Edinboro Road

Edmonton, Alberta

T6G 1Z8

Date: October 1, 1986

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **TAX PROBLEMS OF THE VISUAL ARTIST** submitted by **Helen Christine Turner** in partial fulfilment of the requirements for the degree of Master of Laws.

Supervisor

Date: October 1, 1986

## ABSTRACT

This thesis investigates the Income Tax Act as it applies to the visual artist with special attention to those areas where, because of the artist's peculiar economic situation, the strict application of the Act creates anomalies and, even, injustice.

The thesis begins with a general statement of the particular tax problems experienced by visual artists and the government's response to these problems in the last fifteen years. There follows a consideration of the specific items which must be included in income by the visual artist. Before the companion chapter on expenses and deductions, there is a discussion of the two legal issues which must be dealt with before any expenses can be claimed: the artist must be in business (self-employed) with a "reasonable expectation of profit". Then expenses and deductions are reviewed. The choice of accounting procedures can significantly affect the computation of income for tax purposes and so a chapter has been included which investigates the related questions of inventory valuation and the purported requirement to report using the accrual method. The chapter on estate planning outlines basic techniques for minimizing taxes on an ongoing and pre-mortem basis; however, the emphasis is on the consequences of treating the artist's inventory on death as a "right or thing". In the final chapter the reform proposals implemented in the past two years are evaluated. The conclusion drawn is that we have had administrative

reforms which should have been legislated and legislated reforms which are, at best superfluous. At their worst, they may actually leave artists without benefits they formerly enjoyed.

TABLE OF CONTENTS


| CHAPTER | | | PAGE |
|---|---|---|---|
| I. | THE PROBLEM | | |
| | A. | THE PRESENT | 1 |
| | B. | THE PAST: AN OVERVIEW | 6 |
| II. | INCOME | | |
| | A. | INTRODUCTION | 14 |
| | B. | SALE | 15 |
| | | 1. ACTUAL | 15 |
| | | 2. DEEMED | 15 |
| | C. | GRANTS | 17 |
| | D. | BARTER | 20 |
| | E. | COMMISSIONS | 21 |
| | F. | OTHER | 22 |
| III. | THE DEDUCTION OF EXPENSES | | |
| | A. | SOME PRELIMINARY CONSIDERATIONS | 27 |
| | | 1. EMPLOYEE OR SELF-EMPLOYED | 27 |
| | | 2. HOBBY OR BUSINESS | 30 |
| | B. | EXPENSES | 35 |
| | | 1. EXPENSES OF PRODUCTION | 37 |
| | | a. Studio | 37 |
| | | b. Salaries | 38 |
| | | c. Raw Materials | 39 |
| | | d. Capital Cost Allowance | 39 |
| | | 2. EXPENSES OF SALE | 41 |
| | | 3. OTHER PERMITTED EXPENSE DEDUCTIONS | 42 |
| | | a. Travel | 42 |
| | | b. Membership Dues | 43 |

C. DEDUCTIONS 43

1. STUDIES 44

2. CHARITABLE DONATIONS 45

D. LOSSES 46

IV. ACCOUNTING QUESTIONS

A. INTRODUCTION 57

B. CASH v. ACCRUAL: THE PROBLEM 58

C. INVENTORY VALUATION 61

D. THE CHOICE 66

V. ESTATE PLANNING

A. INTRODUCTION 72

B. ON-GOING OR ANNUAL ARRANGEMENTS 73

1. FLUCTUATING INCOME 73

2. INCORPORATION 75

C. PRE- AND POST MORTEM ESTATE PLANNING 78

1. REDUCTION OF THE ESTATE THROUGH GIFTS OR DONATIONS 79

2. TAXATION OF THE ARTIST'S ESTATE 80
a. Valuation 81
i. Fair Market Value 81
ii. Value 87
b. Rights or Things 87
c. Reporting Choices 89

VI. REFORM

A. INTRODUCTION 99

B. CONSIDERATION OF SPECIFIC ISSUES 101

1. DEDUCTION OF EXPENSES/LOSSES 102

2. ACCOUNTING PROBLEMS 107

3. CHARITABLE DONATIONS 110

C. CONCLUSION 113

POSTSCRIPT 117

BIBLIOGRAPHY 122

# CHAPTER I

# THE PROBLEM

## A. THE PRESENT

In October of 1983, Vancouver artist Toni Onley received national media coverage with his threat to fuel a bonfire on Wreck Beach with a million dollars of his own paintings in protest against Revenue Canada's tax treatment of him as a manufacturer. Mr. Onley had been advised by the Department of National Revenue that his production costs, including his substantial disbursements for travel, were required to be allocated to inventory and could only be deducted from income when the inventory to which they related was sold. This was a matter of no small concern to Mr. Onley whose travel costs for 1983 (in his own words, a "slow year") were $20,000.[1]

When he inquired how "real" manufacturers dealt with the problem Mr. Onley was advised that they liquidated or destroyed inventory -- in that way enabling a reallocation of costs to those items of inventory sold in the year which, in turn, permitted the full deduction of costs incurred in their production. Right! said Mr. Onley. And he headed for Wreck Beach. However, the day before the proposed conflagration, Mr. Onley contracted the media and announced that he wouldn't be burning any paintings after all as he had received a telegram from the then Minister of Communications, Francis Fox, which promised that he, the

Minister, would be "meeting shortly" with the Minister of National Revenue to discuss Mr. Onley's problems.[2] Mr. Onley was mollified, but not entirely satisfied, by this interest in high places. In one report he was quoted as saying "in a choking voice": "They think I'm doing it for myself. I'm not. The whole cultural community of Canada is at stake."[3]

Across the country artists cheered Mr. Onley's flamboyant defence of their cause. Although the majority did not share his particular dispute with Revenue Canada, which arose from an excess of riches, their sense of being discriminated against by the Canadian tax system was finally gaining the sort of prominence which sometimes propels politicians to take steps in the direction of change. Questions began to be raised in the House and on November 2, 1983, the Right Honourable Joe Clark moved the appointment of a special committee "to review all relevant provisions of the Income Tax Act relating to the taxation of visual and performing artists."[4]

Thus, Mr. Onley's statements brought to the nation's attention an attitude which at that time was commonly held by members of the arts community. The feeling was that artists, rather than being supported and nurtured by the Canadian government, were, in fact, being discriminated against and harassed.

At one point during his conflict with Revenue Canada Mr. Onley jested: "If this treatment of Canadian artists continues, it will be simple to

identify a Canadian painting -- it'll be the one with the palm tree in it."[5] Since for many artists the life of the expatriate is neither feasible nor desirable, there is a need for a comprehensive study of their tax treatment by Revenue Canada. This thesis is in response to this need. My goal will be to investigate those provisions of the Act which have particular significance for visual artists[6] with a view towards assisting them, or their advisors, to make informed business and financial decisions.[7]

The problem is aptly stated as follows:[8]

> tax and social security legislation tends to be written and administered on a basis that deals fairly and reasonably with the members of most occupational groups in the country. In most fields of economic activity the structural pattern of industrial, commercial and employment relationships is reasonably clear, and does not usually vary or change rapidly in the short run. The general rules often produce inappropriate results, however, when they are applied to individuals and institutions whose activities do not match the "normal" pattern. This is notably the case in what may be described loosely as the "arts" industry.

The areas in which artists' activities do not match the "normal" pattern has been summarized thusly:[9]

> ...the working conditions of artists are unique. The purpose for which artists work, the ways in which they work, their material requirements, their frequent dual-employment status, the fluctuations in the level of their earnings, the lengthy time often required before they profit from their work, and the entire pattern of their working relationships differ from those of other occupational groups.

More specifically, there are two primary characteristics of the economic life of a visual artist which set him apart from the rest of

the income earning population. The first is that the majority are, by most conventional economic standards, unsuccessful. In 1978, incredibly the year of the most recent survey by Statistics Canada of the economic situation of visual artists,[10] less than 21% of artists surveyed made more than $5,000 from gross art sales. Of the 79% who made less than $5,000, 17,3% reported no income from art sales at all.[11]

The picture is even bleaker in a study conducted by Judy Gouin on behalf of Canadian Artists' Representation Ontario (CARO) in 1980; her conclusion, based on a narrow sample (of 100 questionnaires mailed, 38 were returned completed), is that the average artist's financial position is an annual deficit of 22%.[12] Revenue Canada's "Taxation Statistics" confirm these findings: in the years 1973-1983 the category of "self-employed artists and entertainers" (a category wider in some respects and narrower in others than that investigated by Statistics Canada) hovers close to the bottom of the summary table indicating average income per occupation. For three of these years (1976, 1975, and 1974) the artists' group is fourth from the bottom, receiving a higher average income than fisherman, pensioners and "unclassified". For six of the ten years (1983, 1981, 1980, 1979, 1978, and 1973) only pensioners and "unclassified" received a lower average income than self-employed artists and entertainers. And in one year (1982), even pensioners had higher average incomes.[13]

Having regard to these dismal figures, it is hardly surprising that one comes up again and again against statements by artists that they

are compelled to take employment (often teaching in their field) or, if possible, to arrange for some form of subsidy, public or private, in order to continue to produce art.

The second characteristic which distinguishes artists from other business people is the particular nature of their product. An artist's inventory differs from conventional merchandise in a number of important respects. First, the value of an artist's work is entirely dependent upon the artist's stature and popularity; its selling price may bear no relation whatsoever to the cost of its production. Second, an artist's inventory never becomes "obsolete" as such; on the contrary, works of an early period may excalate in value while current creations are unmarketable. An unhappy example is that of Giorgio de Chirico whose early works, which he no longer owned, fetched progressively higher and higher prices, while his later works were not favourably received. He allegedly was driven to imitate his earlier works which he then misdated, in effect plagiarizing himself.[14] Third, an artist's inventory "turn-over" is erratic and unpredictable. For example, there is Mr. Onley, who reputedly sold 800 paintings in 1981 to one buyer for $930,000 but who claims, on the average, not to sell more than 5% of the works he creates in a year.[15]

The Income Tax Act was not designed to deal with economic activity which so little resembles the conventional business enterprise. Indeed, as we shall see, its strict application to a professional artist can cause exceedingly harsh results.

## B. THE PAST: AN OVERVIEW

The history of the government's consideration of the artists' tax dilemma has been, until very recently, one of deliberation, indecision and inaction. The corollary, however, has also been true; that is, that until recently artists themselves have not been active in drawing attention to the ways in which their already difficult economic situation is exacerbated by the application of the Act. Since the law until the 1986 amendments has been constant, the problems have, in theory, always existed. One can only conclude that there was, in the past, a tacit acknowledgment on the part of Revenue Canada that artists formed a special class.

The Right Honourable Joe Clark, in his speech introducing his motion to appoint a special committee to investigate the tax problems of artists[16] confirmed this hypothesis when he stated that, prior to 1972, by administrative policy, artists were "considered as employees for the purposes of unemployment insurance premiums and the Canada Pension Plan, while at the same time they were considered to be self-employed so that they could deduct expenses incurred in the performance of their art."[17] Mr. Clark suggested that artists lost that special status with the introduction of computer assessments[18] in 1972 which "brought an end to the practice of individual officers of Revenue Canada assessing artists on an individual case by case basis."[19]

To go back a bit farther, in 1962 the Right Honourable J.G.

Diefenbaker, in giving the Speech from the Throne, announced: "A royal commission has been established to review the whole field of federal taxation and its impact on the Canadian economy and to recommend reforms and improvements."[20] Of the 293 written submissions reviewed by the royal commission (which became known as the Carter Commission after its chairman, Mr. Kenneth LeM. Carter), only one was from an arts organization, the Canadian Conference of the Arts (CCA), and the focus of that submission was on the need to encourage more financial support of the arts industry by raising the annual limit on charitable deductions. Not surprisingly, when the Carter Commission put forward its recommendations for reform in 1968 there was not a single mention of the artistic community as a special interest group.[21]

Artists continued to be ignored in the debate over the Commission's recommendations. In the final draft of the 1972 Act artists are mentioned only in section 61 which contains the provisions for income averaging.

However, the Honourable Gerard Pelletier, during his term as Secretary of State (1968-1972), instructed the Arts and Culture Branch of his ministry to examine tax issues of concern to the artistic community. His interest was shared by successive ministers in that portfolio and this interest eventually culminated in the first comprehensive government investigation of the tax problems faced by artists.[22] The late Russell Disney, Senior Partner of Touche Ross and Co. and, not co-incidentally, the Treasurer of the Canadian Conference of the Arts,

was assigned the task of preparing a comprehensive report on the subject. Mr. Disney's conclusions, Federal Tax Issues of Concern to the Arts Community in Canada: An Analysis,[23] was forwarded to Cabinet where it languished in the indifferent arms of various ministerial and interdepartmental sub-committees, none of which were prepared to make the concessions or take the steps which would have permitted an implementation of Disney's recommendations.[24]

When the Federal Cultural Policy Review Committee was created by the Honourable Francis Fox in 1980, many arts organizations hoped that the Disney Report would achieve the prominence which they felt it deserved and it was frequently mentioned by organizations in their briefs to the Committee.[25]

However, in the result, the Applebaum-Hebert Report contained only a general endorsement of the Disney report's proposals;[26]

> Although such proposals may appear to the Department of Finance to require departures from standard practices, to the extent that they involve nothing more that simple equity they can scarcely be construed as special pleading, and this Committee supports them unreservedly.

The Applebaum-Hebert Report does not specify which of Disney's proposals "involve nothing more than simple equity" and its own recommendation in this area is equally vague. Viz:[27]

> 12. Tax provisions respecting the employment status of artists and such matters as the calculation of their costs against income, the valuation of works given for public use and enjoyment, and their entitlement to income averaging must afford equitable treatment in comparison with those applicable to other classes of taxpayers.

The artistic community was left yet again with expressions of interest and concern but with no firm steps towards reform.

Then came the winter of 1983-1984. First, there was Toni Onley. Second, MP's began to relate in Parliament horror stories of tax reassessments of individuals in the arts community which seemed to run counter to all notions of fair play. Individuals were being retroactively denied deductions which had been claimed consistent with years of proviously accepted reporting practice. In most instances these reassessments resulted in hefty tax bills which Revenue Canada was ruthless in collecting.[28] Artists complained of feeling persecuted; a sentiment which led, for example, to the foundation in December of 1983 of "Save the Arts", a national organization based in Nova Scotia established for the exclusive purpose of lobbying the federal government to improve tax conditions for artists.[29] Finally, Parliament was moved to investigate the artists' plight and Joe Clark's motion to constitute the Tax Sub-Committee for this purpose was unanimously approved.

The Order of Reference constituting the sub-committee, dated December 13, 1983, states that it is to:[30]

> review all relevant provisions of the Income Tax Act relating to the taxation of visual and performing artists and writers, including, but not limited to, the criteria for establishing the professional status of visual and performing artists and of writers and the method for determining allowable business deductions for such artists and to recommend any changes that the Committee deems necessary and proper.

The Committee convened on February 21, 1984. It held public hearings on sixteen subsequent occasions and received submissions from 23 interested parties ranging from Maureen Forrester of the Canada Council to Mr. John R. Robertson, Director General, Audit Directorate, Revenue Canada. The Committee tabled its final report on June 21, 1984 and, in response, a number of administrative changes were announced in a press release by the Minister of National Revenue, Pierre Bussieres on June 28th.[31]

While the Tax Sub-Committee was sitting in Ottawa, the Progressive Conservative Task Force under the direction of Perrin Beatty was touring the country to gather submissions on tax reform. In its report dated April 8, 1984 the task force gave its support to two of the artists' primary concerns.[32]

With the Conservative victory in August, 1984, there was optimism in the artistic community that the situation would improve. After all, Perrin Beatty was now the Minister of National Revenue and in a position to implement his reform proposals. In 1985 and 1986 the government did implement administrative and legislative changes in an attempt to address some of the artists' complaints. What those changes were, and how effective they will be, are questions dealt with in the concluding chapter on reform.

We shall now turn to a detailed investigation of the artist's tax situation.

Footnotes to Chapter I:

1. "Only Still Mad at the Taxman," Vancouver Sun, March 27, 1984, p.B9

2. To give Mr. Onley the benefit of the doubt, it was perhaps only coincidence that he had also received a call from his Revenue Canada auditor who told him that, even if he carried through with his threat to destroy his inventory, his assessment would not be changed. "Artist Hedges About Bonfire," Globe and Mail, October 13, 1984, p.B1.

3. Ibid.

4. House of Commons Debates, Vol. XXV, 1st Sess., 32nd Parl. 32 Eliz. II, 1983 at p. 28644. Mr. Clark's reference is to The Income Tax Act, R.S.C. 1952, c. 148 as amended by S.C. 1970-71-72, c. 63 and subsequently. The Income Tax Act will hereinafter be referred to simply as "the Act" and all statutory references will be to it unless otherwise stated.

5. Bryan Johnson, "Arts and the Taxman," Globe and Mail, November 12, 1983, p.10.

6. As the title indicates, my focus will be upon the tax problems of the visual artist. The visual arts field has been defined as encompassing "the traditional fine arts of painting, drawing and sculpture; less traditional forms such as photography, computer art and performance art; the applied arts, such as industrial and graphic design; crafts; and the environmental arts -- architecture and urban development." Federal Cultural Policy Review Committee, Summary of Briefs and Hearings (Ottawa: Department of Communications, 1982), p.87.

7. Of course, there are substantial similarities between artists and other individuals in creative professions; at different points the matters discussed will have some relevance for musicians, actors, writers, and publishing academics. However, the focus of this thesis will remain on the visual artist.

8. Russell Disney, Federal Tax Issues of Concern to the Arts Community in Canada: An Analysis (Ottawa: Department of Communications, 1978), p.2.

9. The Canada Council, The Canadian Artist and the Income Tax Act, February 1984, p.2.

10. Correspondence with Statistics Canada confirmed that: "We do plan to survey visual artists again as part of a new schedule of biennial surveys of all creative and performing artist groups. The first of these surveys will not take place before January 1987, however, and data will not be available until the fall of that year." Extract from a letter to the author from Brian Reagan, Manager, Creative and Performing Artists Survey, Education, Culture and Tourism Division, September 20, 1985.

11. Preliminary Statistics on Visual Artists, (Statistics Canada: Education, Science and Culture Division), Service Bulletin Vol. 2, No. 3, May 1979, p.5.

12. Judy Gouin, The Cost of Earning as a Visual Artist, Toronto: Canadian Artists' Representation Ontario, 1981), pp.7-10. Ms. Gouin's figure reflects the ratio of reported income from artistic activities to reported art related expenses. She points out that when the four reporting artists whose income totals exceeded $25,000 are excluded from the calculation, the deficit margin widens to 89%.

13. Summary Table 3, Taxation Statistics, published annually by Revenue Canada, Vols. 1975-1985 inclusive.

14. Tad Crawford, Legal Guide for the Visual Artist, (New York: Hawthorn Books, 1977), p. 185.

15. Arthur Drache, "Taxman Puts Artist's Costs on Test," Financial Post, October 15, 1983, p.27.

16. The formal title of the special committee became: Sub-Committee of the Standing Committee on Communications and Culture on the Taxation of Visual and Performing Artists and Writers. For the sake of brevity and convenience, the committee shall be hereinafter referred to as the "Tax Sub-Committee."

17. House of Commons Debates, Vol. XXV, 1st Sess., 32nd Parl. 32 Eliz. II, 1983 at p.28644. For a discussion of the significance of the distinction between employee and self-employed status, see pp. 27-30, infra.

18. Mr. Clark's comments were even more apt than he realized; as he spoke Revenue Canada was in the process of carrying out a computerized project which would result in the reassessments of numerous artists who had been deducting business/artistic losses from employment income; see infra. footnote 241.

19. Ibid.

20. House of Commons Debates, Vol.I, 1st Sess., 25th Parl. 11-12 Eliz. II, 1962, at p.8.

21. Moreover, its proposals with respect to the deductibility of business losses, which it described as "generous" would have been quite harsh when applied to professional artists. Report of the Royal Commission on Taxation (Ottawa: Queen's Printer, 1966), Vol. IV, c. 22, at p.255.

22. Arts Bulletin: Special Edition on Taxation (Ottawa: Canadian Conference of the Arts, September 1983), at p.2-3.

23. Disney, supra, footnote 8.

24. This, notwithstanding the statement of the Honourable Mr. John Roberts, Secretary of State, in the House on October 26, 1978 that "active discussions have taken place.... We attach great importance to the Disney report and we are actively persuing discussions within the government." House of Commons Debates, Vol. I, 4th Sess., 30th Parl. 27 Eliz. II, 1978-79, at p.485.

25. The Committee's report became known as the "Applebaum-Hebert Report" after the names of its co-chairmen: composer-conductor and arts administrator Louis Applebaum and Senator Jacques Hebert.

26. Federal Cultural Policy Review Committee, Report, (Ottawa: Department of Communications, 1982), at p. 84.

27. Ibid.

28. Media coverage included such articles as: "Tax Laws Called Threat to Innovative Art," Globe and Mail, November 8, 1983, p.20; G. Mackay, "Angry Artists against the Tax Man," Maclean's, December 19, 1983, p. 53; Robert Fulford, "Paint by Numbers: Toni Onley's Commercial Success Attracted the Attention of Revenue Canada," Saturday Night, January 1984 p. 5; "Art for Taxes Sake," Editorial, Globe and Mail, January 4, 1984, p.6; Mavor Moore, "The Tax Collector and the Man Who Came to Dinner," Globe and Mail, March 3, 1984, p.E5; Gordon Pape, "Painted into a Corner," Financial Post Mag., June 1, 1984, p.64.

29. Garry Conway, "Save the Arts: Recommended Changes," Arts West, July/August 1984, p.12.

30. House of Commons Debates, Vol. I, 2nd Sess., 32nd Parl. 32-33 Eliz. II, at p. 141.

31. The wheels of government moved more swiftly for Mr. Onley. On March 26, 1984, Revenue Canada released a statement that it would permit artists to deduct travel expenses in total in the year they were incurred.

32. Progressive Conservative Task Force on Revenue Canada, April 8, 1984, pp.62 and 64.

# CHAPTER II

## INCOME

### A. INTRODUCTION

As is any Canadian resident, the Canadian artist is taxed on his world income.[33] For the purposes of computing taxable income, section 3 sweeps into the basket net revenue (loss) received by the taxpayer from the following sources; office, employment, business and property. In addition, revenue from a miscellany of "other sources" is added by the provisions contained in Subdivision D. Each source of income is to be computed as though it were the only source of income.[34]

In the course of his business, an artist may receive income or sustain losses from a variety of business transactions, including: sale of works (actual or deemed), grants, payment for commissioned work, royalties, exhibition fees, art rental fees and barter transactions. In many instances the artist is also receiving employment income to supplement or subsidize his artistic activities. Finally, there are other, rarer, forms or causes of remuneration which will be discussed at the conclusion of this section.[35]

B. SALE

1. ACTUAL

The primary mode of earning income for the artist is, of course, the sale of his work. Absent any arrangements to delay the receipt of income (to be dealt with later), the artist need only deduct applicable expenses from the sale price and declare the result as income from a business.[36] Unlike a collector, an artist is in the business of selling his art and therefore any income realized on the sale of such work is accorded income treatment such as would be accorded the sale of inventory by any other business.

2. DEEMED

An artist may be unaware of the provisions in the Act which deems there to have been a disposition with taxable consequences, notwithstanding that no money may have changed hands. Although the deemed disposition rules are most often considered with regard to transactions involving capital property they also, of course, apply to transactions involving inventory; the difference is only that the proceeds of disposition (revenue) are received on the income rather than the capital account.

One example of such a deemed disposition is a sale to a non-arm's length party for less than fair market value, or, a gift to anyone.[37]

In such an instance the artist is deemed to have received proceeds of disposition equal to the fair market value of the work. From this amount the artist may deduct appropriate expenses; nevertheless, the notional profit must be brought into income for tax purposes. Thus, the cautious artist will keep a tight rein on his generosity for the application of this section can cause hardship as follows: in most instances a dealer's commission of as much as 50% would be deductible as an expense in calculating the income from the sale of a work; however, no such expense is incurred when a work is gifted. Thus where a work's selling price would normally be, for example, $6,000 of which $3,000 would be commission, when section 69 applies Revenue Canada might well argue that as no commission was incurred, no commission is deductible, and the full $6,000 (or whatever amount remained after the deduction of actual expenses) should be brought into income.[38]

It is worth noting that where there has been a sale to an arm's length party the sale price and the proceeds of disposition are the same; there are curtains behind which even the taxman may not peek.[39] Thus, where an artist wishes to exchange a work for that of another artist (assuming always they deal at arm's length) it would be advisable to characterize the transaction as a "sale" and the apppropriate documentation should be prepared. The writer submits that this should defeat the application of section 69.[40]

Although it would be possible to argue that each work is consideration for the receipt of the other, the writer recommends that the exchange be treated as two separate transactions. This will simplify the

determination of the tax basis of the received work should it be sold in the future; the tax basis will be the (nominal) sale price. Assuming the artist is in the business of selling only his own work and not that of other artists, the piece received will be a capital asset. However, an artist would not have to be a dealer before Revenue Canada could require income treatment; what would be relevant would be the frequency of the transactions.

Formerly, a particularly contentious application of section 69 resulted in artists being taxed on the fair market value of any work contributed to a charity although in most instances the resulting charitable deduction was limited to 20% of the artist's income for the year.[41] Thus, the amount brought into income in some instances exceeded the amount which was available for deduction.[42]

The tax aspects of charitable contributions will be dealt with comprehensively under expenses/deductions. Although the federal government has implemented amendments which are intended to alleviate this problem, as I interpret them they will only have the effect of neutralizing the negative effect; they do not provide the artist with any incentive to donate works.[43]

## C. GRANTS

A coveted supplement to an artist's income might come from a Canada

Council grant. Revenue Canada's position is that there is no presumption that a government grant is of any particular income character.[44]

The main purpose of most grants offered by the Council is to provide interim financing for project, travel, and/or personal living expenses in order that the artist may carry out work which might not otherwise be possible.[45] In such instances the grant is provided to "augment income or reduce expenses." The artist must declare the full amount of the grant as income from a business but may also deduct reasonable business expenses.[46]

In some instances a Canada Council grant is awarded for the purpose of assisting the artist to further his training by "working with eminent teachers or pursuing studies";[47] in such a case the award would be considered to be a scholarship, fellowship or bursary, or a "prize for achievement in a field of endeavour ordinarily carried on by the taxpayer."[48] In that case only $500 of the award is tax exempt and the remainder is taxable with no deduction for expenses. However, the normal student deductions[49] remain available.

Finally, it is possible that the award could be construed as employment income and taxed as such. In such a situation the grant is usually payable to the employing institution which in turn pays a salary to the individual recipient.[50]

The Canada Council, in its brief prepared for the Tax Sub-Committee

proposes that Revenue Canada acknowledge the high professional calibre of grant recipients and argues for consistent treatment among district offices of the awards. The brief states that artists have recently been reassessed as follows: (1) where the grant was considered to be business income, expenses in excess of the grant have been disallowed; (2) travel grants have been required to be taken into income but the travel expenses have been disallowed as being "personal or living expenses"; and (3) grants have been recategorized as fellowships with the result that necessary expenses have been disallowed.[51]

The first ground of reassessment has administrative support as follows:[52]

> the research expenses allowable under paragraph 56(1)(o) may not exceed the total research grants taxable under that paragraph in the year (i.e., research expenses do not reduce other income such as paragraph 56(1)(n), nor employment income).

However, this position is without foundation in law; indeed, the case of A.W. Taylor v. M.N.R.[53] is in direct contradiction of Revenue Canada's position. Mr. Taylor, an Associate Professor at the University of Alberta received a fellowship award from his University and a research grant from the Canada Council. The issue before the Board was whether certain expenses were for research, and were therefore deductible.[54] or for a "scholarship, fellowship or bursary" -- in which case no deduction for expenses would be permitted.[55] The Chairman, Mr. Cardin, Q.C., held that:[56]

> The Appellant succeeded in establishing, to the satisfaction of the Board, that the expenses claimed by the Appellant were incurred to enable

> him to carry on research in his professional field and were greater than the amount of the research grant received; that they did not include personal or living expenses; that they were over and above the amounts of the expenses that had been reimbursed; and, that the expenses claimed were not otherwise deductible in his 1973 tax year. [Emphasis added.]

Mr. Cardin concluded that the expenses, as claimed, were deductible.

Revenue Canada's other two positions are, in the opinion of the author, similarly without legal support and reflect an inconsistency of approach which could be successfully opposed in the courts.[57]

D. BARTER

Many artists are cash-shy and seek the services (legal, accounting, home repair and renovation, etc.) of individuals who are willing to take payment in kind. Such a transaction gives rise to a taxable event.[58] All of the provisions with respect to a sale (including the deemed disposition rules) apply to a barter transaction.[59] One useful point; in some instances the taxable event may give rise to a deduction provided the service obtained is one which would have given rise to a deductible expense.

Consider the situation where an artist exchanges a work for accounting services. The accountant, who normally would have billed $500 for services rendered waives his fee in exchange for the work. What are the tax consequences for the parties?

Revenue Canada states in its bulletin that the value of the services is the value that would have been received for them. Thus the accountant should be obliged to bring $500 into his gross revenue and would then have a tax basis in the sculpture received of $500. What of the artist? The price of the sculpture, if purchased through the artist's dealer might be considerably higher than $500. On the other hand, it might never sell. Revenue Canada has anticipated such a barter transaction where one item can be readily valued but the other can not; its policy is to consider the former to be the price at which the transaction took place, if the parties are dealing at arm's length.[60] The artist should have a deduction of $500.

However, Revenue Canada is not always consistent in its treatment of the "underground economy"; there have been cases where Revenue Canada has treated the transaction as a gift. In such a case everyone loses -- the individual providing the service has a nil tax basis on the property received and the artist, instead of having a deduction in the amount of the value of the services received has income in the amount of the fair market value of the work.[61]

## E. COMMISSIONS

Occasionally an artist will be commissioned by an individual or organization to create a work. In such a situation the revenue received is business income from which may be deducted all reasonable

expenses incurred. Care should be taken in documenting the relationship between the artist and the commissioning party to avoid the possibility of Revenue Canada's viewing the relationship as employer/employee.

Canadian Artist's Representations's information paper, "Tax Information for Canadian Visual Artists" states: "Where you are creating a commissioned project and receiving a retainer or deposit in advance, you do not have to include this retainer in income until the project is completed and delivered."[62] Whether or not this is the case depends on whether the artist reports on a cash or accrual basis; this will be discussed in Chapter IV.

F. OTHER

Canadian Artists' Representation (CARFAC) and the Association of National Non-Profit Artists' Centres (ANNPAC) have begun, with some small success, to lobby for the payment to artists of exhibition fees. These amounts are, of course, income.

A second, also relatively new, cause for remunerating the artist is gaining acceptance in the United States. This is the "droit de suite". Originating in France, this contractual or statutory obligation would guarantee the payment to the artist of a given percentage of the proceeds on all subsequent, i.e., after the initial, transfers. California has legislation which provides that a seller must pay a

royalty of 5% of the sales price (in excess of $1,000) of works of fine art -- to the artist or artist's agent or, if the artist can not be found to the California Arts Council.[63] Similar legislation has been introduced federally and in 8 other states, including New York.[64]

Occasionally, the artist will license the use of a reproduction of his work -- for posters, prints, postcards and even greeting cards. The resulting copyright royalties are income to the artist.

Finally, there are instances where the artist may participate in a work-related transaction but the receipts will be considered to be on the capital account.[65] An illustration is the Schafer case.[66] Mr. Schafer, a prominent Canadian composer has sold to the National Library of Canada numerous personal documents including original manuscripts, diaries and sketches for the sum of $25,000. The Minister assessed this amount as income from a business. M. Tremblay concluded that these documents were not created for the purpose of sale and, therefore, that the amount received by Mr. Schafer was received from the disposition of capital property. One wonders if, by analogy, an artist might be able to sell, as capital property, preliminary sketches which were "not intended for sale". This is a grey area; in the course of his decision Mr. Tremblay did state that "the artist-musician is not like the artist-painter who paints to sell the original paintings."[33] However, the sale of an artist's correspondence and diaries would certainly qualify for capital treatment.

Footnotes to Chapter II:

33. There is room for considerable confusion of terminology; "income" can be (and is) used to mean variously: gross revenue, net revenue (revenue less expenses, or profit) and taxable income (net income with such further adjustments as are permitted or required by the Act). I shall refer to the first category of income as "gross revenue", the second as "net revenue" and the third as "taxable income".

34. Section 4.

35. The following references are of general usefulness in the area; Canadian; Aaron Milrad, The Art World (Toronto: Merritt Publishing, 1980); Canadian Artists' Representation, Taxation Information for Canadian Visual Artists (Ottawa: Secretary of State Department, 1978); American: Tad Crawford, Legal Guide for the Visual Artist, (New York: Hawthorn Books, 1977); Feldman and Weil, Art Works; Law, Policy, Practice (New York: Practising Law Institute 1974); Ralph E. Lerner, Chairman, Representing Artists, Collectors and Dealers, (New York: Practising Law Institute, 1985); Australian: Shane Simpson, The Visual Artist and the Law (Sydney: Law Book Company, 1982).

36. This simplistic statement ignores the two major problems faced by the artist in calculating income for tax purposes which are: how to value inventory, and whether income must be reported on a cash or accrual basis. These problems are discussed in depth in Chapter IV.

37. Section 69 and 251.

38. This approach to the deduction of expenses -- or lack of it -- in determining what must be brought into income form deemed transactions is assumed in Craig M. Jones's recent article: "Inter Vivos Trusts and the 21-Year Deemed Realization Rules", 84 CR 352, at p. 362. Although Mr. Jones' article deals with the disposition of capital property his comments are equally applicable to inventory transactions.

39. However, it must be emphasized that whether parties are dealing at arm's length is a question of fact and not of definition; para. 251(1)(b). There is also the possibility that the transaction could be attacked under the broad anti-avoidance provisions in section 245.

40. There are, of course, non-tax considerations which must be borne in mind; characterizing the transfer as a sale might bring the artist in breach of contract with his dealer. His ability to give or to sell will be governed by the degree of exclusivity granted to his dealer.

41. The 20% limitation does not apply where the gift is to Her Majesty, para. 110(1)(b), or to an institution pursuant to the Cultural Export and Import Act, S.C. 73-74, c.50 as amended, paragraph 110(1)(b.1). For further discussion of the question of charitable donations, see p. 45 infra.

42. Arguably, the "sale" mechanism suggested above with respect to trades between artists could be employed in this situation as well. Revenue Canada takes the position that there can be no "gifts" from inventory, and no charitable deduction where the amount will also be deducted as a business expense: Interpretation Bulletin IT-288, "Gift of Tangible Capital Property to Charities and Others", February 9, 1976. The writer can see no prohibition of a sale to an arm's length party for less than fair market value.

43. In fact, the effect of the new provisions is identical to the result achieved if the donation is characterized a "sale" and the parties elect a sale price which is does not exceed 20% of the artist's income for the year.

44. The treatment of these funds is outlined in Interpretation Bulletin IT-257 "Canada Council Grants." October 20, 1975, as modified by Interpretation Bulletin IT-273R "Government Assistance -- General Comments," January 19, 1981.

45. The Canada Council, supra footnote 9, p.21.

46. Paragraph 56(1)(o)

47. The Canada Council, supra footnote 9, p.23.

48. Paragraph 56(1)(n).

49. See discussion of student deductions, supra, p.44.

50. R.C. Lafferty v. M.N.R. [1969] Tax ABC 252; 69 DTC 198 (TRB).

51. The Canada Council, supra footnote 9, p.20.

52. Interpretation Bulletin IT-75R2, "Scholarships, Bursaries, Fellowships, Prizes and Research Grants, "January 30, 1980, paragraph 27.

53. [1979] CTC 2356, 79 DTC 331 (TRB).

54. Paragraph 56(1)(o).

55. Paragraph 56(1)(n).

56. Taylor, supra footnote 53 at p. 2358, 333.

57. The difficulty, of course, is the time and expense involved in opposing Revenue Canada which often outweighs the expense of simply paying up.

58. Sections 3, 9 and 69; and Interpretation Bulletin IT-490, "Barter Transactions," July 5, 1982.

59. On barter generally, see Roberta K. Shapiro, "The Tax Consequences of Barter Transactions and the Significance of `A Reasonable Expectation of Profit'," 82 CR 919; Arthur Drache, 4 Canadian Taxpayer, at p. 132.

60. IT-490, supra footnote 58, paragraph 8.

61. A precedent for the disallowance of a deduction where the item exchanged might be considered a "gift" rather than as payment for services rendered can be found in W.T. Blunden v. M.N.R., [1979] CTC 3079; 79 DTC 839 (TRB).

62. Canadian Artist's Representation, "Tax Information for Canadian Visual Artists," 1978, p.2.

63. Calif. Civ. Code 986 (West Supp. 1977).

64. Susan A. Grode, Editor, The Visual Artist's Manual (New York: Beverly Hills Bar Association, 1984), p. 123; and Representing Artists, Collectors, and Dealers, supra footnote 35, p. 557.

65. Of course the advantage to such a characterization is the more generous treatment accorded revenue from the sale of capital property.

66. M. Schafer v. M.N.R., [1981] CTC 2261; 81 DTC 226 (TRB).

67. Ibid., p. 2263.

# CHAPTER III

# THE DEDUCTION OF EXPENSES

## A. SOME PRELIMINARY CONSIDERATIONS

There are two preliminary grounds on which an artist may find his expense deductions disallowed. First, Revenue Canada may determine that he is actually an employee and is therefore restricted to those limited deductions permitted by section 8 which sets out those deductions available to the employee. Pursuant to this section, none of the expenses discussed at pp.35 to 56, infra, would be deductible by an artist/employee. Second, Revenue Canada may determine that the pursuit of his artistic activities is a hobby rather than a business and therefore the expenses incurred in connection with these activities are actually "personal or living expenses" which are stated to be non-deductible by paragraph 18(1)(h).

### 1. EMPLOYEE or SELF-EMPLOYED?

As indicated, in order to be able to deduct the expenses of his work, it is essential that an artist be able to characterize himself as "self-employed" rather than as an "employee".[68] The distinction was formerly described in legal terminology as being between a contract of service (employment) and a contract for services (self-employment or independent contractor). As will be seen, this description has been

modified by the case law; the distinction now turns on an assessment of all the aspects of the working relationship. An artist might unwittingly find himself characterized as an employee as the result of a poorly drafted contract for a commissioned work. Similarly, a contract with a dealer conceivably could render the artist the employee of the gallery.[69]

In few areas of the law have the courts generated so much verbiage as in their attempts to formulate a set of criterea or guidelines the application of which would determine whether an individual in a given situation is an employee or an independent contractor.

Traditionally, the most significant test revolved around the degree of power[70] or control exercised by the master. In the words of Mr. Justice Hilberry,[71] cited with approval by Mr. Justice Cattanach,[72] and in turn quoted by Mr. Tremblay:[73]

> ...the distinction between the contract for services and the contract of services can be summarized in this way; in the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done.

This quote comes from one of two recent decisions concerning film producers/directors, in which Mr. Tremblay of the Tax Review Board attempted to pull together the earlier case law in the area. He has compiled a list of factors which he suggests taken together are indicative of employment status:[74]

1. right to control;
2. right to dismiss;
3. the nature of the task;
4. the freedom of action given;
5. the magnitude of the contract amount;
6. the manner in which it is to be paid;
7. ownership of tools;
8. chances of profit;
9. risks of loss; and
10. integration to payer's business.

At present, Revenue Canada's position is that:[75]

> A contract of service generally exists if the person for whom the services are performed has the right to control the amount, the nature and the direction of the work to be done and the manner of doing it. A contract for services exists when a person is engaged to achieve a prescribed objective and is given all the freedom he requires to attain the desired result.

At the risk of stating the obvious, the writer suggests that a carefully worded contract should, in most instances, avoid an undesired construction of a working relationship by Revenue Canada. Many precedents are available.[76] However, a word of caution -- to cite the Chairman of the Tax Review Board, Mr. K.A. Flanigan Q.C.:[77]

> The question is whether or not this appellant was an employee of the London Life Insurance Company. There was a contract (exhibit A-1) which specified -- and I am quoting from memory -- that, notwithstanding the terms and conditions, the appellant was an independent contractor. This then raises the question as to whether or not the form or the substance of the matters involved before me is important. I think it is well established that it is the substance of the whole transaction, or series of transactions, that one must look at, rather than any isolated part thereof or any wording agreed to by contracting parties if in fact what actually took place did not substantiate the description given to the relationship between them in any written agreement.

In that case, Mr. Flanigan concluded that the appellant, an insurance salesman on commission, was an employee rather than an independent

contractor. It is, however, worth noting that in the circumstances of the case, the taxpayer's "employer" was deducting his taxes at source -- surely for Revenue Canada's purposes one of the most certain indicia of a master-servant relationship!

## 2. HOBBY OR BUSINESS?

Before discussing the second problem which has been encountered by an artist seeking to deduct his art-related expenses some background is helpful: the Act[78] provides that a taxpayer's income for the year shall be the aggregate of his income for the year from each source. From this aggregate may be deducted the aggregate of his losses from each source. Thus, an individual in a deficit position in his business may, under normal circumstances, deduct his business loss from his other sources of income. However, Revenue Canada views with interest and suspicion an individual whose business expenses consistently exceed his business revenue. This is especially the case when the taxpayer seeks to deduct those losses from employment income. Revenue Canada's view is that a business which always operates in the red cannot be carried on for profit, or with a reasonable expectation of profit; the question then becomes whether the taxpayer really is in business at all. If not, then the expenses incurred in pursuit of the activity are "personal or living expenses"[79] and are therefore non-deductible pursuant to the general prohibition contained in paragraph 18(1)(h). In the words of the Carter Commission: "The problem lies in distinguishing between the business that is bursued

for profit and the one that is more of an avocation or recreational activity."[80]

The significance of the discussion which follows may have been reduced as a result of the new administrative guidelines published after the completion of this paper. Comments on this reform are found at the end of this section.

The problem of excess expenses is all too common among visual artists: the results of the Department of Communications study published in 1978 revealed that "overall, in economic terms the lot of the reporting visual artist looks relatively dismal."[81] Indeed, that conclusion seems rather an understatement. Of those artists who considered themselves to be working at their art full-time (FT/0),[82] the average net artistic income was $4,555. The median figure for FT/0 artists was $1,905. Of those who considered themselves to be full-time artists with part-time "other, labour force attachments"(FT/PT), the average was $710. For these artists the median was -$550. Of those who reported as part-time artists (PT), both the average and the median figures were negative -- -$755 and -$600, respectively. In the words of the report: "one wonders how visual artists eventually make ends meet, or how they pay for their living expenses. Presumably the FT/PT and PT artists depend heavily on income from their secondary jobs or occupations."[83]

The artist's gloomy economic outlook was underlined subsequently in submissions to the Federal Cultural Policy Review Committee: "Most

artists, we were told, are forced to look beyond their art to earn a living during the first years of their career. For many this becomes a permanent and debilitating situation."[84] The irony is that the very sacrifice which many artists make in order to subsidize their art -- that of finding other employment in order to supplement, or more precisely, to subsidize, their (lack of) revenue from the sale of art -- was, until recently, put forward by Revenue Canada as justification for disallowing the deduction of the artists' expenses. Simply put, Revenue Canada's position was that an artist's employment is his true occupation and that his artistic activities, because they provide no or insignificant financial return, constitute a hobby or form of recreation. However, professional artists who would like nothing more than to make a living creating art are understandably indignant when they were required to disprove the assumption that they are hobbyists.[85]

R. Schip v. M.N.R.,[86] was, unfortunately, a typical example of the approach taken by Revenue Canada and the courts in such a situation. Mr. Schip, who considered himself to be in the business of free lance fine art photography, received, from his business, income of $524 in 1977 and $942 in 1978. His net loss, as a result of expenses incurred in his business, was $8,972 for 1977 and $7,430 for 1978. Mr. Schip sought to deduct these losses from his teaching salary; these deductions were disallowed on the basis that Mr. Schip's business had no reasonable expectation of profit and, therefore, that the expenses were personal in nature.

Mr. Schip's evidence was that during the years in question he was employed as a sessional instructor, teaching photography, at Ryerson Polytechnical Institute. He taught approximately 22 hours per week. He had studied photography at the University of Washington and Everett Community College (both in Washington State) and at Ryerson where he received a bachelor of applied arts in media studies (the study of fine art photography).

Mr. Schip put forward a two page list of photographic exhibitions (presumably, although the judgement does not say, in which he participated) including one which was reviewed by a Canadian periodical in the field. A sample of his work was included in a catalogue of Canadian contemporary photographers assembled by the Art Gallery of Ontario. Mr. Schip had received grants from both the Ontario Arts Council and the Canada Council the requirements of the latter of which read, inter alia, "the grants are intended for professional artist." Both granting organizations use a juried competition to determine the successful applicants. A publisher and two representatives of private galleries attended to give evidence as to the seriousness and quality of Mr. Schip's work.

In summarizing the evidence and in his analysis, Mr. Tremblay consistently placed emphasis on the question -- can one make a living as a fine art photographer "exclusively", or "solely", from the sale of one's work? As the answer to this question was "no" (albeit a qualified "no"), Mr. Tremblay dismissed Mr. Schip's appeal.[87]

The writer's opinion is that Mr. Tremblay subjected Mr. Schip's activities to a more rigorous test than that envisioned by the statute and the earlier cases.[88] An activity can certainly turn a modest profit and yet remain for from providing the exclusive means of earning a living. With respect, Mr. Tramblay appears to have required a profit -- prefereably a generous profit -- as proof of a reasonable expectation of profit. This appears to be borne out by his statement that "...if, in fact during the year 1982 and the years following, the appellant makes profits there would be evidence of a reasonable expectation of profit and then it would be possible to apply the losses of the former years pursuant to paragraph 111(1)(a) of the Act."[89]

Not all decisions are so harsh; in both the Booth[90] and the Needham[91] cases the Honourable Mr. Cardin found for the taxpayers (both writers) on what this writer considers to have been much weaker facts. It is evident, however, that there is a regrettable lack of consistency among the cases in this area. It is difficult to put forward any clear principles to assist artists in predicting a court's (or for that matter, an assessor's) decision.[92]

However, help is on the horizon. In response to the Tax Sub-Committee's recommendations, the then Minister of National Revenue, Pierre Bussieres, stated in a press release on June 27, 1984 that: "Artists and writers may need much more time to turn a profit than ordinary businesses and we will therefore take that into account

in applying the test of whether there is a reasonable expectation of profit to determine whether they are entitled to deduct certain expenses." This proposal was repeated by the new Minister of National Revenue, Perrin Beatty, in his address to the Conference on Income Tax Administration for Visual and Performing Artists and Writers held in Ottawa on December 18, 1984.[93] Finally, and most importantly, Revenue Canada has compiled and published a comprehensive set of guidelines which it suggests should be applied in assessing whether or not an artist can be considered to have a "reasonable expectation of profit."[94] Even more significant than the new guidelines is the admission by Revenue that "it is possible that a taxpayer may not realize a profit during his or her lifetime but still have a reasonable expectation of profit."[95]

Hopefully, artists will now find Revenue Canada assessors more receptive to their submissions that they are in business, notwithstanding the absence of profits. Whether the courts will agree with Revenue's re-interpretation of the "reasonable expectation of profit" test remains to be seen.

B. EXPENSES

Assuming that an artist has successfully survived the "reasonable expectation of profit" test and may be considered to be carrying on business, then his expenses are deductible provided that the outlay or expense was made "for the purpose of gaining or producing income from

the business."[96] This requirement has the effect of prohibiting an outlay for capital although in that case capital cost allowance can, of course, be claimed. Finally, the expense must meet the general requirement of section 67 that it is "reasonable in the circumstances". If the artist is considered to be a hobbyist, all is not lost. It is Revenue Canada's policy to permit the deduction of expenses incurred in pursuit of a hobby provided that they do not exceed the income received from that hobby.[97] For an artist expenses would include expenses of production and expenses of sale. Expenses of production typically include the cost of raw materials, supplies, studio related expenses (including rent, heat, power, telephone), salaries to assistants and capital cost allowance. Expenses of sale would include dealer commissions, entertainment, preparation of slides and other promotional materials. The Act also provides for the deduction of other expenses which could be attributable either to production or sale, or both. For example, travel expenses could be related both to production and sale. Similarly, membership dues in professional organizations do not fall easily into either category.

Where the artist receives income both from employment and from business, those expenses are deductible which can be attributed to the income received from the business. This may be a proportion of expenses which are not exclusively related to the business income or there may be a full deduction where the expenses can be proven to have been incurred solely for the purpose of gaining income from the business.[98]

1. EXPENSES OF PRODUCTION

a. Studio:

Where studio space is rented, the rent and related expenses are deductible. However, many artists have renovated an attic or other room or have converted their garage to serve as a studio. In such circumstances the cases on deducting expenses of maintaining an office in the home are applicable.[99] The central requirement is that the space be used exclusively for the purpose of the artist's business and can not be used by any other members of the family or for any other purpose. This administrative requirement is obviously directed at preventing abuse; in the words of one commentator: "It is not enough to put a desk in the family room and call it an office."[100] If the test is met then the artist may deduct a proportionate share of the household expenses as office maintenance (e.g., mortgage interest, taxes, heat and electricity). It has been suggested[101] that the proportion of business related expenses to personal expenses be worked out in one of two fashions: either (a) the ratio of room(s) for business purpose to the total number of rooms in the home, or (b) the ratio of the square footage utilized by the studio space to the total square footage of the home.

It is permitted to claim capital cost allowance as well; however, this will necessitate the valuation of the property at the time of the commencement of the business use; when the property is sold the taxpayer will lose the principal residence exemption for the

appropriate percentage of the gain on the sale.[102] Should the artist cease to use the space for income-producing purposes, the provisions with respect to deemed disposition on change of use also apply.[103] The writer suggests that, having regard to these requirements, it would be seldom to an artist's advantage to claim capital cost allowance on his home studio.

The academic/artist may encounter difficulties in deducting a studio at home where the institution provides him with studio space.[104]

b. Salaries:

An artist may deduct salaries paid to employees or assistants. These individuals may provide a variety of necessary services including; bookkeeping, assistance moving heavy equipment and materials, framing, welding, transporting works. However, the artist/employer is obliged to make all the required deductions and remittances for income tax, Canada Pension Plan contributions, Unemployment Insurance contributions and, if applicable, non-resident tax; failure to do so will result in the assessment of interest and penalties in the case of UIC contributions. The non-compliance provisions covering CPP render one liable to conviction of a summary conviction offence.[105] There is the possibility of income splitting here as the Act now permits the payment of a salary to one's spouse.[106] The test to be applied is that the salary paid must be reasonable having regard to the services performed.

c. Raw Materials:

Under the Act as it formerly stood, an artist was obliged (although few did) to calculate the cost of materials and supplies for the purpose of computing the cost of goods sold.[107] The cost of goods sold is, or should be, utilized in determining the profit or loss from the business for the year. However, the recent amendments to the act will permit an artist to elect nil as the value of his year end inventory.[108] The effect of this will be to permit the 100% deduction of outlays for materials and supplies.[109]

The cost of tools, if less than $200, may also be deducted in full.[110] Otherwise a tool counts as capital equipment and the deduction is as calculated for capital cost allowance.

d. Capital Cost Allowance:

Some forms of visual art are highly capital intensive. Although the Act initially prohibits the deduction of a capital outlay or expense,[111] it permits the deduction of a proportion of the cost of such capital outlay in accordance with the Regulations.[112] Schedule II of the Act's Regulations sets out the classes of depreciable capital property and the applicable permitted capital cost allowance. In most instances an artist's equipment would fall into Class 8 of Schedule II and be eligible for a 20% write-off by virtue of the "catch all" provision in that class.[113]

However, it is submitted that an artist can claim the "fast write-off" which applies to property which can be included in Class 29. There are two prerequisites to inclusion in this class; the first is that the property must "but for this class, ... be included in Class 8" and the second is that the property must have been "acquired by the taxpayer to be used directly or indirectly by him in Canada primarily in the manufacturing or processing of goods for sale or lease".[114]

The effect of inclusion in Class 29 together with the provisions in the Regulations[115] is that the maximum capital cost allowance that may be claimed is 25% of the capital cost in the year of acquisition, 50% in the following year, and 25% in the third year.[116]

Assuming always that the property is not property specifically included in a class other than Class 8, the core issue to be determined is whether an artist can be considered to be a manufacturer or processor for the purposes of Class 29.[117] Revenue Canada's view is that "the manufacture of goods normally involves the creation of something (e.g., making or assembling machines, clothing, soup)...".[118]

Judicially the term "manufacturing" has been defined as follows -- per Spence, J. (f119), citing with approval a decision of Archambault, J. of the Superior Court of the Province of Quebec:[120]

> For the present purposes, I wish to note and to adopt one of the definitions cited by the learned judge, i.e., that "manufacture is the production of articles for use from raw or prepared material by giving to

> these materials new forms, qualities and properties or combinations whether by hand or machinery."

In view of Revenue Canada's position and the above-noted judicial consideration, the writer submits that an artist's work certainly falls within the scope of manufacturing. Of course, such a write-off would only be of use where the artist had sufficient income to utilize the deduction.[121]

2. EXPENSES OF SALE:

All reasonable expenses incurred in the course of selling the artist's work are, of course, deductible. In this area, the primary expense for the artist who is beginning to receive some recognition and who has been fortunate enough to attract a dealer is the dealer's commission. This amount can run as high as 60% (the more successful the artist, the less the commission). Depending upon the nature of the artist's contract with his dealer the dealer may even be entitled to a commission on works gifted, donated or sold by the artist from the studio. Other sale-related expenses which, again, depend upon the nature of the artist/dealer agreement are expenses incurred in promoting exhibitions which costs may include the design and printing of invitations, newspaper and other media advertising and refreshments.

All other promotional expenses are deductible as well. For example, it is quite common for an artist to incur sizable expense in the preparation of slides of his work. These are used extensively where

the works themselves can not be transported.

3. OTHER PERMITTED EXPENSE DEDUCTIONS:

a. Travel

Travel expenses may be for the purpose of artistic enrichment and/or the purpose of promoting the artist's works. The latter are clearly deductible; thus, expenses to visit a dealer or to attend and promote a gallery opening in another city (provided, always, that they are reasonable) will be deductible. Expenses incurred for artistic enrichment are more ambiguous and care should be taken to avoid any possible construction of the trip as a vacation.[122] In dismissing one taxpayer's optimistic argument that his travel expenses should be deductible because the "company benefited from the knowledge he gained", Mr. Boisvert, Q.C., stated:[123]

> To hold that expenses incurred in a pleasure trip are deductible because in the course of travelling one has acquired some knowledge that just might prove useful later on in the carrying on of a business would be tantamount to deciding that all travelling expenses are "an outlay for the purpose of gaining income from a business", for no one will dispute that fact that a person who travels always learns something new. Pleasure trips give rise to personal expenses, the deduction of which is prohibited under the Income Tax Act.

Where such expenses are permitted, Revenue Canada in its press release of March 26, 1984 has stated that they may be written off in the year in which they were incurred and do not need to be allocated to specific items of inventory.[124] This administrative position has been

confirmed in the new Interpretation Bulletin.[125]

As may any businessman, an artist may deduct the expense of travel to, and attendance at, two conventions a year. The usual qualifications apply; that is, the geographical location must be one which may be "reasonably regarded as consistent with the territorial scope" of the host organization.[126]

b. Membership Dues:

Deductions for memberships in professional organizations and associations are permissible provided it can reasonably be shown that the memberships relate to the earning of income from business or property.[127] In the field of visual art some such professional organizations are: Canadian Conference of the Arts, Canadian Artists' Representation Ontario (CARO) and its sister organization, Canadian Artists' Representation/Front des Artistes Canadiens (CARFAC), The Association of National Non-Profit Artist Run Centres (ANNPAC), and Save The Arts.[128]

C. DEDUCTIONS:

In addition to the above noted deductible expenses, an artist may also have the benefit of the particular application of certain personal deductions. It should be emphasized that there is no requirement that

the artist be "carrying on business" for the following deductions to be available.

1. STUDIES:

As may all taxpayers, artists may take advantage of the provisions which permit the deduction from income of tuition fees and the education deduction.[129] As well, artists who have completed their formal training frequently participate in workshops to develop existing skills, learn new techniques and exchange ideas with other artists. Such workshops generally do not fulfill the stringent requirements which must be met to permit the deduction of tuition fees. In fact, under the strict application of the Act, the cost of attending such workshops should be non-deductible as being either a personal or living expenditure or as being a capital expense.[130] However, Revenue Canada's policy is to permit the deduction of such expenses as being a training expense.[131] Moreover, in his press release of June 27, 1984, Mr. Bussieres said he "agreed with the Sub Committee that self-employed performers should be allowed to treat the cost of music, acting or other lessons for the purpose of general self improvement in their field as deductible expenses. Present practice limiting deductions to lessons incurred for a particular role, part or performance will be changed immediately so that in future self-employed performers will have the same entitlement as do practioners such as doctors and lawyers to deduct to costs of such personal development in their discipline."[132] This question did not receive further comment in Revenue's new Interpretation Bulletin on

Visual Artists and Writers.

It should be noted that students in the visual arts are obliged to make substantial outlays for materials, modelling charges and other expenses which are not deductible as the students are not "carrying on business". In his report, Russell Disney proposed that "the Secretary of State request that the Department of Finance consider the introduction of a special provision in the Income Tax Act permitting the deduction of the cost of specified types of special expenses incurred by students in fine arts and crafts."[133] That recommendation has not been repeated in any subsequent study and the government has not implemented any such provision.

2. CHARITABLE DONATIONS:

As noted previously,[134] the provisions with respect to charitable donations by artists have recently been amended. Formerly, by virtue of the application of section 69, the artist was deemed to have received as income the fair market value of the work donated. From this amount could be deducted: (1) any inventory costs which would have been deducted had the item been sold, and (2) any expenses connected with the transfer. As most artists carry their inventory at zero the first deduction did not serve to reduce income. In computing taxable income the artist could deduct the full fair market value of the donation from his income; however, this deduction was limited to 20% of the artist's income for the year. Thus, at best, the

transaction was a "wash" with the artist deducting from income that which he was deemed to have received.[135] At worst, the artist was obliged to pay tax on the value of the work which exceeds the permitted 20% deduction.

The punitive aspects of the law have been corrected; recent amendments to the Act permit an artist who is making a gift out of inventory to elect any amount between the work's cost and its fair market value as his "proceeds of disposition."[136]

It should be noted that in some circumstances the full value of a charitable donation may be deductible, although in that situation the deduction is actually being given for the gift as a promotional expense. An example is the Olympia Tile case in which the taxpayer's charitable contributions in excess of the 10% (at that time) limit were permitted as a business expense.[137] A charity is not permitted to issue a receipt for a donation which has been claimed as a business expense.

D. LOSSES:[138]

As we have seen, the economic outlook for the visual artist is dismal.[139] For these impoverished souls the issue of the deductibility of business (technically referred to as non-capital) losses from other sources of income is of central concern.[140]

The rules with respect to the deduction of non-capital losses are contained in section 111 which provides, inter alia, that non-capital losses may be carried back three years and forward for seven.[141] A loss in one year which can not be absorbed by profits in either the three preceeding years or the seven succeeding years is, therefore, lost as a deduction to the artist.[142] However, the artist does have discretion to take the deduction when he chooses over the eleven year period.[143] And, it should be noted, Revenue Canada might change its mind about the economic character of the artist's work and decide that, in fact, there is, or was, a reasonable expectation of profit after all. In that case, provided the losses fall within the prescribed period, they will be deductible.[144]

The foregoing represents the law as it stands. Arthur Drache, who appeared on his own behalf, and Peter Weinrich, who appeared on behalf of the Canadian Crafts Council, had some instructive comments to make in their submissions to the Tax Sub-Committee with respect to their practical approach to the deduction of losses. Mr. Drache emphasized the need to be "prudent" and gave as an example the fact that he refused to let his wife, an authoress, write off the expense of a home office which, he stated, meets all the tests:[145]

> Now the argument back is: If they have a "legal" right to do it, why should they not do it? I mean, everybody has the right to claim what they have a right to claim. The answer back is that at some point there is prudence that should be involved and to push the system to the point where when an assessor comes in and he sees that a poet is making the same kind of claims that a lawyer making $150,000 a year is making, the same amount of claims in terms of his house, just throws him completely.

Mr. Weinrich describes the same approach, that of understating expenses, but without Mr. Drache's equanimity. After having one brush with the authorities, he states:[146]

> What I am doing now is, after I have added the columns in my ledger and determined my yearly expenses and my loss, I deduct a certain percentage of what are LEGITIMATE expenses and calling [sic] them "personal" so that my loss will be getting smaller each year. I hope that in this way Revenue Canada will leave me alone and allow me to continue to try my best to earn a profit and, hopefully, earn my entire living from my work.
>
> If I put in all my legitimate expenses and continue to show losses, I am afraid of what Revenue Canada will do by way of disallowing my loss. Isn't that something -- a citizen of Canada being afraid of what the government will do to me when I am not doing anything illegal and am trying my best to earn a living in these difficult times!!!

Because of the perceived difficulty in assessing an artist's entitlement to the deduction of losses, it has been suggested[147] that the Act be amended to provide for a restricted loss provision similar to that which presently exists under section 31 for farmers.[148] The writer finds such a proposal incapable of justification.

In his excellent book on the taxation of farmers and fishermen, K.D. McNair states:[149]

> Perhaps no provision of the Income Tax Act has given rise to so much confusion, uncertainty and litigation as that section (now section 31) that attempts to limit the losses of those individuals variously described as part-time farmers, gentlemen farmers or hobby farmers.

In arguing for the repeal of section 31, Arthur Drache states:[150]

> ...[t]here is no need in this day and age for this provision. Either a farm business is carried on with

> a reasonable expectation of profit, in which case it should be treated like any other business; or there is no reasonable expectation of profit, which makes the expenses purely personal in nature.

Mr. Drache's article was motivated by reports that Revenue Canada was denying the deduction of losses claimed by farmers who, because of the difficult economic times, were being forced to seek part or full time employment elsewhere.

The parallel between the struggling visual artist and the struggling farmer is obvious; it should be equally obvious to serious observers that a restricted loss provision designed for artists would leave them in a worse position than they are now -- inevitably its application would result in restrictions being placed on the deduction of losses which now are fully-deductible. Perrin Beatty made this point in his address:[151]

> I think the business test, applied carefully, is a much fairer instrument for taxpayers than a definition under law, however wide it may be. In my view it would never be wide enough to encompass all the deserving and it might well discredit the system by allowing in dilettantes. And I would also ask you to consider whether unique tax treatment for artists and writers would necessarily be to your advantage. Indeed, the Parliamentary Committee's recommendations would have restricted some deductions, to which artists are entitled at present.

"Save the Arts" presented a novel suggestion to the Tax Sub-Committee on this issue; its proposal was that an artist be able to transfer unused losses up to an arbitrary amount (they suggest $5,000) to a relative or patron.[152]

Footnotes to Chapter III:

68. Of perhaps even more significance to the artist than the tax consequences of this distinction are two other considerations which, although outside the scope of this paper, turn on the categorization of an individual as an employee or as self-employed. The first concerns the availability of unemployment benefits and other employment related programs. In at least one instance, documented in the CARO pamphlet, "Visual Artists & Part-Time Employment", supra footnote 12, an artist paid UIC premiums during his period of employment only to find that he had been classified as self-employed when he attempted to claim UIC benefits; the interested reader is referred to the Disney Report, supra, footnote 8, and Sanderson, The Musician and the Law (Toronto: Carswell, 1985). The second and very important consideration involves the ownership of copyright in the artist's work. The Copyright Act, R.S.C. 1970, C-30, subsection 12(3) states that where the author was "in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall in the absence of any agreement to the contrary, be the first owner of the copyright."

69. Of course, in some instances, the successful artist may choose to be the employee of his own corporation. The relative merits of incorporating are dealt with at pp.75-78 infra.

70. See Frank D. Jones, "Benefits Under the Income Tax Act" (1967-68) 6 Alta. L.R. 157, especially p. 160-161.

71. Collins v. Hertfordshire County Council, (1947) K.B. 598, at p. 615.

72. Thomas Alexander McPherson v. M.N.R., NR-91 dated March 24, 1976.

73. Ralph Brandes v. M.N.R., [1983] CTC 2187 at p. 2195; 83 DTC 158, at D.164 (TRB).

74. Charles L. Braive v. M.N.R., [1981] CTC 2790 at p. 2803; 81 DTC 748 at p. 758 (TRB).

75. Interpretation Bulletin IT-312, "Musicians and Other Performers," May 3, 1976 as amended by Special Release dated March 29, 1985, paragraph 4.

76. Canadian precedents can be found in Milrad, supra, footnote 35, and Paul Sanderson, Model Agreements for Visual Artists, (Toronto: Canadian Artists' Representation Ontario, 1982). American precedents are found in Crawford and Feldman and Weil, supra footnote 35 and Grode, supra footnote 64. Also useful is

the Australian work by Simpson, supra footnote 35.

77. Donald B. MacDonald v. M.N.R., [1974] CTC 2204 at p. 2205; 74 DTC 1161 at p.1162.

78. Section 3.

79. Section 248.

80. Royal Commission on Taxation, supra footnote 21, Vol. IV, p. 255.

81. Iris M. Bradley, Profiles of Visual Artists in Canada 1978 (Ottawa: Department of Communications), at p.116.

82. As indicated in the text, the responding artists were placed in three categories: FT/O, FT/PT, and PT. In the words of the report: "Twenty percent of those surveyed fall into the FT/O group, 29% are defined as FT/PT artists and 44% are PT artists. the remaining 7% of the respondents are individuals who consider themselves full-time artists and who have additional, full-time jobs. Information about them was not included in the analysis; their numbers were too small to deal with alone and too large to incorporate in another group without changing its composition." Ibid, p.13.

83. Ibid, p.116.

84. Federal Cultural Policy Review Committee, Briefs, supra footnote 6, at p.89.

85. In practice this can create a true double-bind for the academic artist. In a fine arts department the equivalent of "publish or perish" dooms the un-exhibited staff member to non-promotion; yet it is the artist, and not his employer who must provide the funds for his professional advancement. There is an interesting policy question here; Revenue Canada, not unreasonably, holds that if the work is required as a function of the artist's employment then it is the employer who should be providing the financial support and not the government.

86. [1983] CTC 2221; 83 DTC 190 (TRB).

87. To the writer's knowledge no artist has attempted the audacious argument accepted in the race-track gambling case, Walker v. M.N.R., [1951] CTC 334; 52 DTC 1001. In finding for the taxpayer, Deputy Judge Hyndman observed (at p.340, 1004): "In the present case, I do not think that in Walker's circumstances he could reasonably believe he could afford to lose much money on a hobby of this kind, from which I infer that his intention in embarking on this business was to make profits out of it."

88. Gwyneth McGregor, "Reasonable Expectation of Profit," 5 Canadian Taxpayer, p.93-95 (June 7, 1983) and Shapiro, supra footnote 59.

89. Schip, supra footnote 86, at p.2229 and 197.

90. L.K. Booth v. M.N.R., [1979] CTC 2654; 79 DTC 595 (TRB).

91. A.R. Needham v. M.N.R., [1974] CTC 2078; 74 DTC 1957 (TRB).

92. Tax assessors are not hired on the basis of their competence in art appreciation; there is, therefore, a sort of humour in the anecdote recounted by Mr. John Bosely (MP-Don Valley West) during the course of the Tax Sub-committee hearing. Allegedly a Vancouver artists was told by Revenue Canada's representative: "I know why you cannot make a profit; it is dreadful art." Tax Sub-Committee, supra footnote 16, 11:19.

93. Conference on Income Tax Administration for Visual and Performing Artists and Writers, Delta Inn, Ottawa, December 18, 1984.

94. Interpretation Bulletin IT-504, "Visual Artists and Writers," March 17, 1986.

95. Ibid., paragraph 6.

96. Paragraph 18(1)(a).

97. This administrative practice is noted in the Tax Sub-Committee's Report, p.9. There is, however, no legal foundation for Revenue's policy. Neither hobby related income nor hobby related expenses are relevant for tax purposes. However, as this is one of Revenue's policies which favors the taxpayer it is not likely to be opposed. As always, it should be emphasized that neither Revenue Canada nor the courts are bound by Revenue Canada's prior (or, for that matter, present) administrative policies.

98. J. Chlumecky v. M.N.R., 12 Tax ABC 317; 55 DTC 183, D.R. Pepper v. M.N.R., 10 Tax ABC 67; 54 DTC 104, E.J. Blunt v. M.N.R., 14 Tax ABC 299; 56 DTC 73.

99. G.O. Hill v. M.N.R. 34 Tax ABC 169; 64 DTC 1 ("office" in dining room -- no deduction); J.A. Cork v. M.N.R. [1981] CTC 2367; 81 DTC 346 (TRB) (draftsman -- no deduction, activities more in the nature of a hobby); G.W. Turner v. M.N.R. 1969 Tax ABC 180; 69 DTC 168 (part of home rented to company as office; deductible); J.V. Toolsie v. M.N.R., [1980] CTC 2239; 80 DTC 1209 (TRB); and E.F.A. Merchant v. M.N.R.; [1982] CTC 2742; 82 DTC 1764 (TRB) (both lawyers -- permitted deductions for office in home).

100. Arthur Drache, "An Office at Home," 4 Canadian Taxpayer 152 (October 5, 1982).

101. Ibid.

102. Interpretation Bulletin IT-120R2, "Principal Residence," February 16, 1984.

103. Ibid, paragraph 8.

104. H.E. English v. M.N.R., [1956] Tax ABC 87; 56 DTC 267.

105. Unemployment Insurance Act, 1971, S.C. 1970-71-72, C.48 as amended, sub-section 68; Canada Pension Plan, R.S.C. 1970, c-5 as amended, sub-section 42(1).

106. By virtue of the repeal of subsctions 74 (3) and (4) in 1983.

107. The formula for the computation of year end inventory is; value of inventory on hand at the beginning of the year plus the cost of purchases during the year minus inventory on hand at the end of the year equals cost of goods sold.

108. Subsections 10(6),(7),(8) amended by S.C. 1986, c.6.

109. A discussion of inventory valuation and the new provisions is found at pp.61-65 and 107-110.

110. ITR Schedule II, Class 12.

111. Paragraph 18(1)(b).

112. Paragraph 20(1)(a).

113. Class 8(i) reads "a tangible capital asset that is not included in another class in this Schedule except..." Exceptions not relevant.

114. ITR, Schedule II, Class 29.

115. ITR 1100(1)(t) as amended and 1100(1)(ta).

116. For a comprehensive investigation of the effects of these provisions see Interpretation Bulletin IT-147R2 "Capital Cost Allowances -- Accellerated Write-off of Manufacturing and Processing Machinery and Equipment," June 19, 1985.

117. This question is also of significance in determining whether or not the incorporated artist is eligible for the manufacturing and processing tax credit. See p.76, infra.

118. Interpretation Bulletin IT-145R "Canadian Manufacturing and Processing Profits -- Reduced Rate of Corporate Tax." June 19, 1981.

119. The Queen v. York Marble, Tile and Terrazo Ltd., [1968] CTC 44 at p.48; 68 DTC 5001 at p. 5003 (SCC).

120. M.N.R. v. Dominion Shuttle Co., Ltd., 72 C.S. 15 (SCC).

121. In some instances, e.g., where the artist is involved in "performance art" and there is no end product as such the writer submits that "processing" would encompass such an activity. On this see: Federal Farmers v. M.N.R. [1966] CTC 22; 66 DTC 5068 (Ex.Ct.).

122. On this point; see No. 470 v. M.N.R., 10 Tax ABC 257; 58 DTC 29 where an architect was permitted to deduct the expenses of two trips to Europe to visit medical faculties similar to the one he had been contracted to design; and No. 686 v. M.N.R. 23 Tax ABC 1006 where the expense of travel to Florida (in the first case) and to Haiti (in the second) were disallowed.

123. No. 686, supra, at p. 381; 126.

124. This was a victory for Toni Onley whose travel expenses include an annual stay in Japan of at least one month and the maintenance of two private airplanes.

125. IT-504, supra footnote 94, paragraph 8.

126. Subsection 20(10) and Interpretation Bulletin IT-131 "Convention Expenses," November 15, 1982.

127. Interpretation Bulletin IT-211R "Membership Dues; Associations and Societies," November 15, 1982.

128. A much more restricted deduction with respect to membership dues is permitted to employees under subparagraph 8(1)(i)(i); such expenses are deductible by an employee only if membership is necessary to maintain his professional status. In no instance would this provision permit an employed artist to deduct membership in any of the above noted organizations.

129. Tuition: paragraph 60(e),(f),(g) and student; paragraph 110(1)(g), and see Interpretation Bulletin IT-82R3, "Tuition Fees," February 20, 1984.

130. On this see Chlumecky, supra footnote 98, where the taxpayer was denied the deduction of expenses incurred attending a music festival in the United States where he spent two months in "study and self-improvement."

131. Interpretation Bulletin IT-357R, "Expenses of Training," May 21, 1980.

132. On this point, it is of interest that Arthur Drache, in his testimony before the Tax Sub Committee indicated that, in his view, expenses incurred for books and courses to "expand one's horizons" would be as deductible for an artist/actor as for a tax lawyer; 13:31-32. By implication, Mr. Drache's view would seem to be that artists, actors and musicians have always been entitled under the Act to deduct such expenses.

133. Disney, supra footnote 8, at p.33.

134. See p.17 supra.

135. Paragraph 110(1)(a). The expenses, if any, cancelled each other out.

136. Subsection 110(2.3). And see IT-504, supra footnote 94.

137. Olympia Floor & Wall Tile v. M.N.R. [1970] CTC 99; 70 DTC 6085 (Ex.Ct.).

138. On the treatment of losses generally, see John A. Stacey, "The Treatment of Losses," 83 CR 29.

139. See statistics infra, p.31.

140. This question is intimately related to two issues which have been discussed at length elsewhere; the "reasonable expectation of profit" test and the non-deductibility of personal or living expenses. Where the artist has failed to satisfy Revenue Canada that he has a reasonable expectation of profit, or where the expenses which he seeks to claim are considered to be "hobby" related and in excess of his "hobby" income, then the excess of his expenses over his revenue will be non-deductible. It bears repeating as well that expenses may be non-deductible as having been made on account of capital.

141. Paragraph 111(1)(a).

142. This statement of the law reflects amendments to section 111 by S.C. 1983-84, c.1, s. 54(1). For 1982 and prior years, non-capital losses were permitted a one year carryback and five year carryforward.

143. Sub-paragraph 111(3)(a)(1). This, as well, reflects the amendments to section 111 by S.C. 1983-84, c.1., s. 54(2). Previously the taxpayer could not deduct a loss which was deductible in a preceding year, notwithstanding that it was not deducted. Alexis Nihon Co. Ltd. v. M.N.R., 1969 Tax ABC 39; 69 DTC 53.

144. The reader is referred back to the comments of Mr. Tremblay in Schip, supra footnote 86.

145. Drache, Tax Sub-Committee, supra footnote 16, 13:40.

146. Weinrich, ibid, 9:9.

147. Denhez, Tax Sub-Committee, supra footnote 16, 15:7; Canada Council, supra footnote 9, p.16.

148. Section 31 provides for three categories of farmers described by Mr. Justice Dickson, (as he then was) in W. Moldowan v. The Queen [1977] CTC 310 at p. 315; 77 DTC 5213 at p. 5216 (SCC) as follows:

> (1) A taxpayer for whom farming may reasonably be expected to provide the bulk of income or the centre of work routine.
> (2) The taxpayer who does not look to farming, or to farming and some subordinate source of income, for his livelihood but carrie[s] on farming as a sideline business.
> (3) The taxpayer who does not look to farming, or to farming and some subordinate source of income, for his livelihood and who carrie[s] on some farming activities as a hobby.
>
> Those taxpayers in the first category may deduct all farm losses, the second are subject to a $5,000 annual limit on their losses, the third may not deduct any farming losses at all.

149. K.D. McNair, The Taxation of Farmers and Fisherman, (Toronto: Richard De Boo, 1980), p.123.

150. Arthur Drache, "Section 31, Follow up," 5 Canadian Taxpayer 95.

151. Beatty, supra footnote 93.

152. Tax Sub-Committee, supra footnote 16, 11A:9.

## CHAPTER IV

## ACCOUNTING QUESTIONS

### A. INTRODUCTION

In computing their "profit" from business as required by Section 9, self-employed artists encounter difficulties with two related tax accounting principles.[153] The first is the popular assumption that all taxpayers, with the exception of farmers and fishermen, are obliged to report income using the accrual method. The second is the statutory requirement that inventory be valued at the lower of cost or fair market value (or all at cost, or all at fair market value).[154] Although these accounting principles are not particularly complex, in the hands - or pens - of some, they can become quite confused and confusing. During the months of Toni Onley's noisy protests, journalists with little accounting or tax knowledge struggled to explain the foundation of the disagreements between the artistic community and Revenue Canada and in the process created some novel phrases. One such is the expression employed by Robert Fulford in an article for Saturday Night magazine. Mr. Fulford explained that Mr. Disney, in his report, had "proposed taxing artists on a cash basis rather than on accrual of inventory."[155] Not to do Mr. Fulford an injustice, it should be noted that accrual accounting and inventory valuation are so interrelated that to discuss them separately is to create an artificial distinction. However, for the purpose of dealing

with the problems raised for the artist by these accounting principles, I shall deal first with accrual accounting and then with inventory valuation.

## B. CASH v. ACCRUAL: THE PROBLEM

Section 9, the charging section for income from business or property states that "... a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year." The calculation or computation of that profit requires that one make a choice of accounting procedures. The importance of the choice is that different accounting procedures can produce significantly different conclusions which, in turn, can result in a marked increase (or decrease) in taxes payable.

What is at issue is the timing of revenue receipts and expenses for income tax purposes. To the extent that revenue can be deferred, tax on that revenue is deferred as well. The converse is also true. To the extent that expenses can be taken in the present, either against business income or, where permitted, against other sources of income, that also is effective tax deferral. The cash method of calculating profit permits the taxpayer to deduct in full expenses when paid and requires inclusion of income only when it is actually received.[156] The accrual method permits the deduction of expenses when incurred (whether or not they have actually been paid) and requires the

inclusion of income when earned (whether or not it has actually been received.)

The Act does not provide any rules as to the computation of profit as can be seen from the oft-quoted words of Cartwright, J:[157]

> The expression "profit" is not defined in the Act. It has not a technical meaning and whether or not the sum in question constitutes profit must be determined on ordinary commercial principles unless the provisions of the ITA require a departure from such principles.

Generally accepted accounting principles (GAAP)[158], which are often taken as being synonymous with "ordinary commercial principles", require that in order to get a fair reflection of the results of an operation for a specific period of time, one should attempt to put expenses into the same period as the revenue they caused to be generated.[159] This is known as the "matching principle" and its application is seen as requiring the use of the accrual method of accounting. Therefore, it is generally assumed that a business must report its income in accordance with the accrual method.[160]

One finds some support for this assumption in the fact that several provisions of the Act reflect accrual accounting procedures.[161] Administratively and judicially the accrual method has received support as well. Robert C. Reed, speaking on behalf of Revenue Canada at the 1981 Corporate Management Tax Conference stated:[162]

> Over the years the Tax Act, court decisions and the Department's interpretations have shown a steady progression from a basically cash basis to an accrual basis method of reporting income.

In light of the foregoing, it is not surprising that artists are conventionally advised that they are obliged to employ the accrual method in calculating their profit for the purposes of section 9. For example, in a booklet titled "Taxation Information for Canadian Visual Artists" prepared by Canadian Artists Representation with funds from the Research and Statistics Directorate, Arts and Culture Branch, Secretary of State Department, it is stated that: "Artists must use the accrual method for reporting income and expenses."[163] Even Mr. Disney, in his report, made this assumption by referring to "a change in the permitted basis" in describing a proposal to "permit" artists to use the cash method.[164]

Nevertheless, it is submitted that there is no basis in law for requiring artists to employ the accrual method in reporting income for tax purposes. What is required is that the accounting method employed be one that accurately reflects the true financial position of the business for the year. An excellent statement of this proposition is found in the judgement of President Thorson of the Exchequer Court in the Publishers Guild of Canada case:[165]

> I cannot express too strongly the opinion of this Court that, in the absence of statutory provision to the contrary the validity of any particular system of accounting does not depend on whether the Department of National Revenue permits or refuses its use. What the Court is concerned with is the ascertainment of the taxpayer's income tax liability. Thus the prime consideration, where there is a dispute about a system of accounting, is, in the first place, whether it is appropriate to the business to which it is applied and tells the truth about the taxpayer's income position and, if that condition is satisfied, whether there is any prohibition in the governing income tax law against its use.

Thus, where a business has significant accounts receivable, accounts payable, or inventory the cash system would be inappropriate for tax purposes as its application would not result in a true statement of the business's financial position. However, where these items are not significant, a taxpayer might well be able to justify the use of the cash system for accounting purposes.[166]

## C. INVENTORY VALUATION

As a result of recent amendments to the Act, individuals in the "art business" have legislative authority to value their inventory for tax purposes at nil.[167] The following discussion deals with the law as it stood immediately prior to the enactment of the new provisions. This, admittedly historical, review of the superceded provisions is necessary as a foundation for the critical evaluation of the reform measures now implemented.

The writer understands from a number of interviews with professional artists that accounts receivable and payable are not significant in their businesses. What must be considered however, is whether or not inventory is significant and to determine that requires an investigation of inventory valuation.

For application to business generally, the Act sets out how inventory must be valued for tax purposes in subsection 10(1) which reads:

> For the purpose of computing income from a business the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

Regulation 1801 reads:[168]

> Except as provided by section 1802, for the purpose of computing the income of a taxpayer from a business:
> (a) all the property described in all the inventories of the business may be valued at the cost to him; or
> (b) all the property described in all the inventories of the business may be valued at the fair market value.

Formerly, an artist, like any businesman, was obliged to determine the value of his inventory in accordance with these provisions. If the inventory value which resulted was significant, then the artist was probably precluded from using the cash method of accounting.[169]

We shall now consider the valuation of an artist's inventory at cost.[170] First, an artist must determine what his product costs are for the year. Those costs are added to the value of his opening inventory (which must be his closing inventory for the previous year). From that combined figure is deducted his closing inventory and that result is his cost of goods sold for the year. It is the cost of goods sold which is deducted from revenue to arrive at income -- not the actual expenses paid in the year. Thus, the value of inventory reflects the cumulative cost of producing the unsold works of art.

Accountants favour this approach as it complies with the "matching principle" mentioned previously. The effect of cost allocation is that

the cost of producing an item of inventory is recognized as an expense only in (or not until) the accounting period when the item is sold. However, for most artists, whose works sell unpredictably, if at all, there would be considerable hardship if they were required to follow this procedure.

In his speech proposing the constitution of the Tax Sub-Committee the Right Honourable Joe Clark put the problem as follows:[171]

> If you are an artist whom the computer calls a manufacturer, you must sell or liquidate your inventory, which in this case is all of your artistic works, on a yearly basis if you wish to deduct all of the legitimate expenses for that year.

Mr. David Orlikow (MP-Winnipeg North) put the problem in a rhetorical question to Maureen Forrester and Anthony Porteous of the Canada Council during their submission to the Tax Sub Committee as follows:[172]

> For example, an artist has painted 10 or 15 pictures in the course of a year and has had all the expenses in producing those paintings, and maybe has only sold five and is left with ten. How serious is it for the artist if Revenue Canada says; Well, you can only charge off one-third of the expenses and the other two-thirds are inventory and you have to pay taxes on them right now even though the artist may not sell the other ten for two, five, twenty years or may never sell them?

In response, let us consider an example. A printmaker might expend $6,000 in purchasing materials which, for the purpose of simplifying the example, we shall assume are entirely consumed in creating a run of 30 lithographs. None of them sell. The printmaker has had to pay for the materials with money obtained somewhere -- other sales,

employment, a spouse's support -- and which has been taxed as income in her own or someone else's hands; however, she can claim no deduction in respect of those costs. The money used to purchase those materials remains after-tax money until the lithographs are sold; hence the expression, used by Mr. Orlikow, "to be taxed on inventory". Of the 30, let us assume that none is sold until seven years later when the artist has a national exhibition and her works are suddenly in demand (relatively speaking). She then sells thirteen.

A manufacturer would determine a unit cost for each of the lithographs of say $200 ($6,000 divided by 30) and as each item was sold that unit cost would become the expense to be allocated against the revenue received from the sale of that item. But a manufacturer would not have to wait seven or more years before being able to recognize the cost of unsold inventory as an expense. In accordance with GAAP, the manufacture would, at the end of an appropriate period, be able to declare that unsold inventory as obsolete and the costs of its production could be recognized as an expense. The artist, however, has been obliged to absorb expenses which she may only recover years later, if at all.

An additional factor which operates to the artist's detriment is inflation. A dollar spent in 1978 and matched against a sale in 1985 does not give an accurate reflection of revenue and expenses without some form of index for inflation.[173]

It should be noted that not all artists experience the allocation of costs to inventory as a problem; a successful artist whose work sells well and predictably might prefer to value inventory at cost.[174] An example is Toni Onley whose problem did not arise from a dispute over whether production costs must be allocated to inventory. Rather, his dispute turned on what kind of cost travel expenses were and whether they could be written off in total as periodic or pre-production costs or whether they were product costs and had to be allocated to inventory.[175] We shall deal with some of the reasons why an artist might prefer to allocate costs to inventory later in considering the advantages and disadvantages to the use of the cash system.

The alternative to cost allocation as a method of valuing inventory (which, of course, presupposes the use of accrual accounting) is to value inventory at fair market value. This is the approach recommended by the Canada Council in its brief to the Tax Sub Committee. The brief cuts across all the arguments about cost accounting by submitting that, with respect to an artist's inventory, the lower of cost or fair market value is fair market value which, it suggested, is nil:[176]

> No established objective measure exists for evaluating a praticular work since it is usually unique to itself, to the artist, and to the eventual reputation of either or both. A value exists only when a buyer is interested in the particular work. Consequently, there normally would be no net realizable value of the work of art until a buyer and a selling price were determined.

The argument is brought full circle in the following quote taken from Rubin L. Gorewitz, a New York chartered public accountant, who

represents many artists. Mr. Gorewitz supports his argument that artists should be permitted to employ the cash method of accounting by pointing to the dubious and uncertain value of an artist's inventory:[177]

> The income of artists including sculptors, can only be reflected by the use of cash basis accounting because of the obsolescence of art works as artists change styles, the possibility that even a completed work may be destroyed to use the materials in a newer work, and the unknown sales potential of any work.

D. THE CHOICE

The advantage to the use of the cash system of accounting is that, in the words of Arthur Drache; "It offers the opportunity for incredible manipulation of your income."[178] As stated earlier, the possibility of manipulating income results in the possibility of substantially altering the amount of income taxes payable.

A second advantage to using the cash method is that it avoids the problem, inherent in the accrual method, of being taxed on non-cash assets (accounts receivable and inventory) before these are realized. Otherwise, one must meet the cash requirement for payment of income tax before the money is available to meet that obligation. In a more conventional business operation this problem is offset by the ability to deduct trade accounts payable and other liabilities which, however, are not significant in an artist's operation.[179]

A third advantage of the cash method is that the bookkeeping requirements are direct and uncomplicated. As artists generally are temperamentally indifferent to business details and are not known for their business acumen, an artist might choose the cash method for this advantage alone. Of course, simpler accounting procedures are also less expensive.

In the short run, these advantages look very appealing.

However, the cash method is not without its drawbacks which, surprisingly, are seldom discussed. First, the immediate recognition of costs as expenses - instead of using some form of allocating costs to inventory - is only an advantage where there is income from which those expenses can be deducted. If the artist's business connot absorb the expenses or their deduction from other income is barred as being personal or living expenses, then the losses may expire by the time the artist is finally in a position to have some income against which to deduct them.

Secondly, there is the possibility for double tax through the interaction of section 69 and the cash reporting method.[180] Assume a non-arm's length transfer in 1985 of a work the fair market value of which is $8,000 the actual sale price of which is $4,000 to be paid in $1,000 installments annually commencing in 1986. Section 69 deems the artist to have received $8,000 in 1985. If the artist uses the cash method of reporting income then the installment payments should also be brought into income in the years in which they are received. There

is a precedent for this anomalous and unfortunate result in the British case of Morrison v. C.I.R.[181] In that case the taxpayer had shifted, with the appropriate authority's consent, from the use of the accrual system to the use of the cash system. Subsequently, the taxpayer received payment of some accounts which had been billed (and taxed as accounts receivable) in previous years. The Court held that the taxpayer was obliged to include the amounts paid as income in the year in which they were received notwithstanding that the effect was double taxation.

A third disadvantage of the cash system is that, although it is often possible to manipulate income with its use; there are some occurrences which defy planning, e.g. the artist's death. Such an occurrence could result in a substantial overstatement of income when previously ignored assets must be brought into income.

In conclusion, the writer submits that the artist has a choice between the use of the cash or the accrual method of accounting - however, the choice is a good bit more complex than has been commonly assumed.

Footnotes to Chapter IV:

153. The ensuing discussion focusses upon the accounting procedures which are seen to be required by the Act; whether or not one is obliged to have one's accounting procedures for tax purposes conform to one's accounting procedures for financial statement purposes is an issue which is currently before the courts. On this see Arnold, Timing and Income Taxation, (Toronto, Canadian Tax Foundation, 1983) at p. 35 and Metropolitan Properties Co. Ltd. v. M.N.R. [1982] CTC 2254, 82 DTC 1258 (TRB); reversed The Queen v. Metropolitan Properties Co. Ltd. [1985] 1 CTC 169, 85 DTC 5128 (FCTD); appeal to Federal Court of Appeal filed March 1985.

154. Section 10(1) and Regulation 1801.

155. Fulford, supra footnote 28. Emphasis added.

156. When speaking of the cash method one is, in fact speaking of a modified cash system: even taxpayers with statutory permission to report income on a cash basis -- farmers and fishermen -- are limited by paragraph 20(1)(a) in respect of their deductions for capital outlays to the amounts permitted by regulation.

157. Dominion Taxicab Association v. M.N.R., [1954] SCR 82 at 84, 54 DTC 1020 at 1021.

158. Mr. Arnold, in his excellent book Timing and Income Taxation, supra footnote 153 at p.6, puts forward the following definition by the Accounting Principles Board of the American Institute of Certified Public Accountants:

> Generally accepted accounting principles ... is a technical term in financial accounting. Generally accepted accounting principles encompass the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time. The standard of "generally accepted accounting principles" includes not only broad guidelines of general application, but also detailed practices and procedures.

159. Whether or not the two actually are, legally, synonymous has not been conclusively decided. On this see Arnold, ibid., at p. 16ff, and Metropolitan Properties v. M.N.R., supra footnote 153, in which Mr. Cardin, Chairman of the Tax Review Board held that the two were not synonymous or interchangeable. Mr. Cardin was overruled on that point by Walsh, J. of the Federal Court Trial Division, who held that there was not any significant difference between the two. Currently under appeal.

160. This assumption has been eroded by two recent decisions; viz, Gibraltar Mines Ltd. v. The Queen, [1985] 1 CTC 116; 85 DTC 5085 (FCTD) and Harris Steel Group Inc. v. M.N.R., [1985] 1 CTC 181; 85 DTC 5140 (FCA).

161. These sections are:

section 10 which sets out the inventory accounting requirements;
paragraph 12(1)(b) which requires the inclusion of any amount receivable by the taxpayer in respect of property sold or services rendered;
subsection 18(9) which postpones the deduction of prepaid expenses to the year to which the expenses relate;
section 28 which permits farmers to use the cash method;
section 34 which requires professionals to use a modified accrual method; and
sub-subsection 87(2)(c) which provides for the transfer of accounts receivable/payable after amalgamation.

162. Robert C. Reed, "The Dilemma of Conformity: Tax and Financial Reporting -- a Perspective from Revenue Canada," 81 Corp Man Tax Conf p.1 at p.8.

163. Canadian Artists' Representation, supra footnote 35, p.1.

164. Disney, supra footnote 8, at p.27.

165. Publishers Guild of Canada v. M.N.R., [1957] CTC 1 at p.7; 57 DTC 1017 at p.1026.

166. Arnold, supra footnote 153, at p.81; McNair, supra footnote 149, at p. 15.

167. Subsection 10(6).

168. Section 1802 deals with the valuation of animals and is not relevant to this discussion.

169. In dealing with inventory valuation one is in a chicken and egg situation; the valuation of inventory at "cost" presumes the use of accrual accounting. However, it is one of the alternatives specified by the Act and therefore must be investigated.

170. It is beyond the scope of this paper to discuss the various forms of cost accounting. In using the term "cost" I intend to encompass all those outlays associated with the creation and preparation for sale of the piece of art -- materials, studio overhead, labour, etc -- those items which are sometimes referred to as "production costs". I exclude those items to which accountants refer as "period costs" -- so called because they can be taken as expenses in the period in which they are incurred. Some such period costs would be advertising and administrative costs. As might be imagined, most artists' outlays fall into the former category. On this see Rosen and Granouf, Canadian Financial Accounting, (Scarborough: Prentice-Hall, 1980), p. 36 and following.

171. House of Commons Debates, Vol. XXV, 1st Sess., 32nd Parl. 32 Eliz II, 1983, p. 28644.

172. Tax Sub-Committee, supra footnote 16, 2:15.

173. Canada Council, supra footnote 9, at p.8.

174. See comments by Peter Weinrich, Executive Director of Canadian Crafts Council before the Tax Sub-Committee, especially pp. 9:21 and following.

175. Arthur Drache, Financial Post, supra footnote 15. As noted, supra p. 47, travel expenses are now deductible in full as a result of Revenue's policy statement in IT-504, supra footnote 94.

176. The Canada Council, supra footnote 9, p.8.

177. Crawford, supra footnote 35, at p. 235.

178. Tax Sub-Committee, supra footnote 16, 13:19.

179. McNair, supra footnote 149, at p.15.

180. Ibid., p.196.

181. (1928-33) 17 TC 325 (Scottish Court of Sessions).

# CHAPTER V

## ESTATE PLANNING

### A. INTRODUCTION

The writer would suggest the following as a description of estate planning:

Business and financial arrangements designed or entered into for the purpose of conserving assets during one's lifetime and at death, having regard especially to the attempt to minimize the impact of taxes. In most instances, this purpose is accompanied by the desire to retain control of the assets. Such a description permits estate planning to be broken down into two main categories: first, arrangements made for the purpose of reducing taxes on an on-going or annual basis and, second, arrangements made for the purpose of reducing taxes resulting from the death of the taxpayer. Although there is some unavoidable degree of overlap between the two, we shall proceed with the discussion of estate planning for the visual artist utilizing these admittedly artificial distinctions.[181]

## B. ON-GOING OR ANNUAL ARRANGEMENTS

Given that the Canadian tax system is progressive, with higher income being taxed at higher rates, the primary goal of estate planning on an on-going or annual basis is the reduction of taxable income. This goal can only be achieved in two ways -- through the use of deductions[182] and the use of income averaging techniques.

### 1. FLUCTUATING INCOME

A common problem for visual artists is caused by fluctuating income which may result from factors over which the artist has no control, such as the vagaries of the economy and popular taste -- or as a result of his own decision, such as when works are withheld from the market in preparation for a major show. It is to the artist's advantage to "smooth" any bursts of income over a number of years. At one time it was possible to achieve this result with the use of income averaging annuities; however, with the November 12, 1981 Budget, the statutory techniques for income averaging were severly restricted and now the artist wishing to achieve that result is confined to the provisions of section 110.4. This section permits the taxpayer to exclude an elected amount from income for the year, thereby reducing taxable income and the artist's marginal tax bracket for that year. However, tax on the excluded amount must be paid at the maximum rate. The excluded amount, indexed to reflect inflation, may be brought back into income at some future time and taxed at the applicable rate at

that time. Should that result in a lower rate of tax payable on that income, credit will be given for the excess tax paid -- without interest, however. If the artist would pay tax at the maximum rate on the averaged amount in any event,[183] and anticipates a reduction of income in the succeeding year or years, then forward averaging may be of some benefit. There is no recent information which would enable us to determine how many artists might benefit from forward averaging; however, using the 1978 Department of Communications study as a rough guide the writer would hazard that barely a handful of visual artists in Canada are fortunate enough to fall into that class.[184]

It should be noted that, although taxpayers generally are permitted to forward average only if their income for the year exceeds a base amount,[185] an artist may average all amounts, without limitation, which are "his income for the year of averaging from the production of a literary, dramatic, musical or artistic work".[186]

The artist might also consider spreading income over a number of years through his own contractual arrangements. Should he be reporting income on a cash basis then he may spread income with the use of an installment payment arrangement. Monies will then be taxed when received. Should he be employing the accrual method, the same effect may be achieved under the provisions of paragraph 20(1)(n) which permits a reserve to be claimed for amounts "not due until later year". The provision contains two requirements -- (1) that a portion of the deferred amount is not due until more than two years after the sale and (2) that the total amount is not due until after the end of

the taxation year in which the reserve is claimed. A word of caution: it has been held that where a reserve is claimed under paragraph 20(1)(n) this commits the taxpayer to the use of accrual reporting.[187] A potential non-tax problem with such arrangements, specially in a business as economically volatile as art sales, is that the artist may be left with an uncollectible debt rather than deferred income.

## 2. INCORPORATION

The preceding discussion has been based on the assumption that the artist was unincorporated; we shall now consider whether the use of the corporation can provide the artist with a preferable solution to the problem of reducing taxable income on an annual or on-going basis.

There is a generous amount of information available on the advantages and disadvantages of incorporation generally.[188] The writer will deal with the question of incorporation only insofar as it might concern a visual artist.[189]

The overriding requirement which must be met before incorporating need even be considered is that the artist's business must be generating income on a consistent basis; that is, there should not be a negative cash flow over time. If the artist is in a consistent loss position then there is no benefit to incorporating, and there may even be harm.[190] Because a corporation has a separate and distinct legal identity, incorporation traps the artist's losses in the company and

renders them unavailable for deduction from his other sources of income.

Assuming, then, that the artist has a positive cash flow -- for incorporation to be useful there are two further considerations. First, the tax payable by the corporation on that income should be less than the artist would have had to pay as a sole proprietor and, second, the artist must be able to afford to leave money in the company or to pay it out as salary/dividends to family members.[191] The introduction of the Corporate Distributions Tax in the November 12, 1981 Budget eliminated the fairly substantial tax saving which formerly could be achieved by earning income in a corporation, having it taxed with the benefit of the small business deduction, and paying in out virtually tax free up to a certain amount. Now, with its recent repeal, incorporation again has attractive tax saving potential. As the artist's company should be entitled to the additional tax reduction for manufacturing and processing,[192] there is additional tax saving. However, whether these tax savings are sufficient to offset the expense of compliance with the legal and accounting obligations imposed upon a corporation by provincial and federal statutes is a matter for close investigation.[193] Of course, once the company's taxable income exceeds the amount which can be taxed at the small business rate (presently $200,000 per annum) there is double taxation.[194]

Considering the first method of reducing income on an on-going basis noted previously -- the use of deductions -- incorporation is of

little tax advantage to the visual artist. All the deductions available to a corporation carrying on the business of the creation and sale of works of art are available to an unincorporated individual in the same business. Thus, incorporation is an improvement only where there is a possible doubling up of deductions -- such as charitable donations both by the artist's company and the artist individually in order to circumvent the limitation of 20% of income discussed at p.50. Even here, it must be remembered that there is never a tax advantage to an artist in contributing his own work.[195]

However, if "lumpy income" is a problem for the visual artist then it is suggested that incorporation might be of significant benefit. This assumes what was suggested above as a necessary condition to the use of a corporation -- that is, that the artist must be able to leave funds in the company. If so, incorporation provides a desirable alternative to the forward averaging provisions of the Act. Instead of paying tax now, at the highest marginal rate, the artist would pay tax at a substantially lower rate -- 20% (assuming the small business deduction and the allowance for manufacturing and processing) -- and the savings would be in the company.

There is one additional possible benefit in incorporation; if it is finally determined by the courts that a corporation's accounting procedures for tax purposes do not have to conform to its accounting procedures for financial purposes,[196] there might be a significant advantage to the use of a corporation. The latent income of the

artist's inventory need not be reflected in the share value for tax purposes; the artist can deal with his shares, for example by way of sale to his spouse, at a price well below the actual value of the assets represented by those shares. Such a transaction should be approached with caution, however; the writer's view is that Revenue might find such an arrangement susceptible to attack under the general anti-avoidance provisions of subsection 245(2).

Should incorporation be selected by the taxpayer/artist there is a tangential benefit. The company can be used to establish the distinction between works which the artist considers inventory, which will be owned by the company, and those which he holds individually as a collector.[197] The latter will be capital property available for the capital gains exemption. However, it is suggested that careful record-keeping by an unincorporated individual could achieve the same result.[198]

## C. PRE- AND POST MORTEM ESTATE PLANNING

One goal of pre- and post-mortem estate planning is to reduce the taxes accruing as an incidence of the death of the taxpayer. In attempting to achieve this goal on behalf of an individual, the advisor should not lose sight of other matters of importance such as providing for the support of dependents and, more broadly, providing for an orderly and equitable distribution of assets. Estate litigation consumes the assets of the estate; a tragic illustration is the

prolonged dispute which arose between the executors and beneficiaries of the estate of the prominent American artist, Mark Rothko.[199] Whatever the artist's financial or personal situation, it is crucial that he have a carefully drafted will which is reviewed on a regular basis.

1. REDUCTION OF THE ESTATE THROUGH GIFTS OR DONATIONS

As has been seen, there is virtually nothing that an artist can do to reduce his estate by way of gifts or charitable donations which will not attract substantial tax consequences. Ironically, there is a far greater financial advantage to being a successful art collector than to being a successful artist.[200,201]

There is one small wrinkle in the new provisions of the Act enacted to pursuant to the March 22, 1985 Budget which might operate to an artist's advantage. Under the former wording of the Act, a transfer for fair market value between spouses did not protect the transferring spouse from the effect of the attribution rules. Thus, even if an artist were to sell his wife a painting under terms which would hold as between arm's length parties, any revenue which she would derive from the sale of that work would still be taxed in his hands. That is no longer the case. Now, an artist may sell a work to his spouse and, provided the terms comply with the provisions of 74.5(1), which, in essence, require that the sale have occured at fair market value, any subsequent revenue from that painting will be taxed in the hands of

the transferee spouse. Clearly, the sale must be a bona fide sale, and the artist will be taxed on the revenue he receives. But, subsequent appreciation of the work will accrue to the spouse who is presumably in a lower tax bracket; whether she is taxed as a collector or as a trader is a separate matter and would depend upon the facts of the individual situation. This could be described as a variation on the estate "freeze" as the value to the artist is frozen -- and realized -- at the time of sale, thereby reducing his estate at death.

## 2. TAXATION OF THE ARTIST'S ESTATE

In the United States, where the artist's unsold inventory is subject to estate tax, artists are said to have destroyed works to avoid incurring taxes beyond the ability of the estate or the survivors to pay.[202]

> It is rumoured that Thomas Hart Benton destroyed a million dollars worth of his art because his wife could not afford to pay the estate taxes. The late Ted de Grazia also decided to resolve his estate problems by destroying his creations during his lifetime, beginning by burning 100 paintings which he valued at $1.5 million in 1976.

Although in Canada estate taxes have been repealed in all provinces except Quebec, an artist is still faced with the prospect of substantial taxes on death as a result of the application of section 70. We shall now turn to a discussion of the effect of that section which contains the provisions requiring that certain items of income be brought into income for tax purposes upon the death of the taxpayer. To narrow the field of discussion even more, we shall

concentrate upon the problems encountered in dealing with the one asset of most artists which sets them apart from other taxpayers -- a large amount of unsold appreciated works on hand.[203] We shall address first the question of determining a value for the purpose of applying section 70. We shall then argue that an artist's appreciated inventory should properly be classified as a "right or thing" under Section 70(2). Next, we shall investigate the various reporting choices which are available to a legal representative under 70(2) and 70(3). Finally we shall review the implications for the artist's beneficiaries.

a. Valuation

For our purposes the most important item in the estate of an artist is his inventory of unsold works. Whether these items were held by the artist as an individual or by his company, their value must be determined for purposes of compliance with the Act. We shall first discuss the problems encountered in determining the "fair market value" of the artist's inventory. Then we shall discuss the suggested effect of the use of the unmodified word "value" in certain sub-sections of section 70.

i. Fair Market Value

"Fair market value" has been defined as:[204]

> The highest price available estimated in terms of money which a willing seller may obtain for the property in an open and unrestricted market from a willing, knowledgeable purchaser acting at arm's length.

During the artist's lifetime, the fair market value of a given work should not be difficult to obtain. Information concerning the recent sales of equivalent pieces by that artist, or other artists of roughly approximate stature, will generaly be available to assist in arriving at a reasonable estimate of value. However, where the artist is recently deceased, that fact introduces two significant legal considerations: first, as it is no longer an individual work which is being valued but the artist's entire unsold inventory -- should there be some discount or allowance made for a notional block sale? Second, an artist's work may appreciate rapidly as a result of the fact that his death creates an absolute limit on the supply of his works. What effect should this have upon the valuation of works in the artist's estate?

Dealing first with the question of the effect of a block sale -- or "blockage" -- the only case directly on point is the Estate of David Smith.[205] Mr. Smith was an American sculptor who died on May 23, 1965. At the time of his death he owned 425 pieces of sculpture. One issue before the court was the fair market value to be ascribed to those pieces for estate tax purposes. The executors had determined a hypothetical retail value for the works, if sold individually at the time of the artist's death, of $4,284,000. They then discounted this figure by 75% on the theory that these works could only all be sold at that time to a bulk purchaser for resale who would insist on a discount of that magnitude. The Internal Revenue Service agreed with the hypothetical retail price but refused any discount. The court, in what it allowed was a "Solomon-like pronouncement" arrived at a figure

of $2,7000,000 as the value of the works. Although Judge Tannenwald expressly stated that "[we] find it unnecessary, in this unusual case, to make any hard-and-fast choice between the two approaches urged by the parties,"[206] the effect of the judgment was to permit a discount of approximately 36% from the "one at a time" total sale price of the pieces.[207] In a note on the Smith case, Feldman and Weil criticize the judgment sharply as having failed to approve and utilize a suitable and realistic method of valuating an artist's estate which could then have served as a guide to others in similar situations.[208]

There are no Canadian cases which address this question as it applies to an artist's estate. Some guidance may be taken, however, from the cases which deal with the question of "blockage" as it applies to the valuation of a large block of publicly traded securities.[209] In all of these cases some discount was permitted either for the fact that an attempt to sell all the shares at once would have "broken the market"[210] or for the "delay, uncertainty and inconvenience resulting from the sale of shares over a reasonable period of time."[211] The discounts permitted ranged from 9% to 25% with each case being taken on its own particular facts.

Thus, the writer submits that it can, with confidence, be argued that some discount should be permitted in determining the fair market value of the artist's inventory at death; however, the amount of that discount can not be stated with any certainty and would have to be decided having regard to the specific circumstances of each particular

situation. The following were matters which Judge Tannenwald felt were significant in reaching his decision in the Smith case:[212]

> We have taken into account certain other elements involved in the valuation process as they existed at the moment of death. These include the fact that Smith's reputation as a sculptor had not fully blossomed; the relatively low level of acceptability of nonrepresentational sculpture in the market place; the distribution of the 425 items according to size, period in Smith's life during which they were created, and their expression in relative terms, of the quality of Smith's work; Smith's tendency to work in series and whether or not a given item was part of a complete series owned by Smith at his death; the number of sales by Smith (or his agents) in the 25 years before his death and the prices at which sales were made during the period immediately preceding and following death; the fact that the bulk of the items was located at Bolton Landing, N.Y. which was relatively inaccessible, and that a large number of the items could not have been readily transported to a location more accessible to potential buyers.

Not content with this substantial list, Judge Tannenwald notes in a footnote: "In listing such elements, we do not mean to imply that we have set forth every consideration which has influenced our decision herein."[213]

The second question to be considered is whether the fact of the artist's death should be taken into account in valuing his inventory at death. This should be a matter of considerable concern as the appreciation of art works following the death of the artist may be quite significant. It is a fact that the value of a painting by the deceased Canadian artist, Jack Bush, tripled in the year after his death. Figures available as a result of litigation in the United States following the deaths of other major artists (Rothko, Lipshitz,

deKooning) reflect even more staggering rates of appreciation.

It is a basic principle of valuation that value relates to a specific point in time.[214] With respect to the valuation of assets held at death, the Act states that the time of valuation shall be as follows:

| | | |
|---|---|---|
| accrued periodic amounts | 70(1) | day of death |
| rights or things | (2) | time of death |
| capital property | (5)(a),(b) | immediately before death |
| spousal transfer (rollover) of portion of class of depreciable property | (6) | immediately before death |
| transfer to spousal trust (election) | (7) | immediately after death |

It is truly astonishing that within one section dealing with one event -- the taxpayer's death -- there should be such variety. The result is that a collection of works may have different values depending upon its categorization pursuant to section 70. It is equally astonishing that there are almost no cases which investigate the effect of the various time reference points on the valuation of assets.

We do have the Mastronardi case which resolves the question with respect to the meaning "immediately before death". The conclusion in that case was that the imminence of death should not be a factor in determining the value of shares in a closely held private corporation.[215] Thus, where the property to be valued is the artist's shares in his own corporation which, in turn, owns his works, the works should be valued without regard to any post-mortem appreciaiton.

Where, however, the property is to be classified as a "right or thing", as we shall argue is the case were the property is inventory

of a sole proprietorship, or, where the property is to be transferred to a spousal trust, then the writer would submit that the fact of death must participate as a consideration in the valuation and the crucial question is to what degree should information concerning the actual effect of the artist's death upon the market have upon the valuator's conclusions.

The writer would submit that both the phrase "time of death" and "immediately after death" import knowledge of the death having had accurred but exclude knowledge of subsequent events. It is well established in Canadian law that retrospective evidence is not admissible in the determination of valuations.[216] In the words of Mahoney, J.:[217]

> I expressly rejected the validity of hindsight as probative of fair market value at a given date and took nothing that occurred after valuation day into account.

This is not to say that no allowance should be made for post-mortem appreciation; rather, it is to say that what should be reflected in the valuation is that degree of appreciation which might be anticipated by a knowledgable purchaser, informed of the artist's death, but not any information as to the <u>actual</u> effect of the artist's death upon the market. In the words of Dankwerts, J.:[218]

> It is necessary to assume the prophetic vision of a perspective purchaser at the moment of the death of the deceased and firmly to reject the wisdom which might be provided by the knowledge of subsequent events.

ii. Value

If, as will be suggested, the unincorporated artist's inventory at death is caught by section 70(2) which deems there to have been a disposition of the taxpayer's "rights or things", then the question arises as to the meaning of the word "value" which is used in subsection 70(2).[219] Revenue Canada takes the position that "value" is to be interpreted as "net income".[220] As a general rule of thumb the Interpretation Bulletin suggests that those expenses may be deducted which would have been deductible by the taxpayer in computing his income had he not died. This is of importance to an artist whose net realizable income from the sale of a work may be less than half of its fair market value. However, it has been pointed out that there is no statutory authorization for this deduction and, should Revenue Canada take an opposing position, an artist's estate might find itself embroiled in costly litigation.[221]

b. "Rights or Things"

If the artist has incorporated during his lifetime then it is his shares in that corporation which must be valued and the provisions of section 70(5) which deems there to have been a disposition of capital property immediately before death will apply. There are numerous excellent articles dealing with the valuation of shares of a closely held corporation.[222] If the artist has not incorporated then the question is -- how is the artist's unsold inventory to be categorized. Should the artist have been reporting on a cash basis, Revenue

Canada's explicit position is that it is a "right or thing":[223]

> Subsection 70(2) is designed to include in income amounts that have been earned but have not been included in income, such as ... amounts in respect of which an amount has been deducted in computing income such as a "cash basis" inventory.

Where the artist has been reporting on the accrual system the writer has been informed by Revenue Canada that its position is that the difference between the closing inventory of the last complete fiscal period and the fair market value at death is a "right or thing". This, however, is not stated in the above noted Interpretation Bulletin and several writers have suggested that this position may not be correct. In an interesting article, A.B. Davidson argues that, because of the use of the word "value" in 70(2), the section does not apply to an amount where only the profit is income and not the whole amount.[224] Thus, he suggests that the inventories of stock-in-trade which would have been sold in the course of business are not "rights or things". He continues:[225]

> The difficulty is, of course, that if it does not apply, there would appear to be no relevant section in the Income Tax Act which would apply; any attempt to sustain this position would be met with great resistance by the Department and it might be difficult to convince the courts of it.

Intrepid counsel might therefore attempt to argue that the inventory of a sole proprietor falls outside the ambit of section 70 (since such property is quite definitely not included in any other of the deemed disposition of death provisions) and is therefore not taxable in the hands of the estate.[226]

This argument has been considered because of its novelty and daring; however, this writer agrees most with Mr. Davidson when he says that it might be difficult to gain support for the position in the courts. It is suggested that, in fact, the statute is quite clear and that the alleged ambiguity is introduced by the Department's attempts to explain in its Interpretation Bulletin rather than any ambiguity in the legislation itself. Further, the writer does not think the use of the word "value" supports Mr. Davidson's argument that the section is "only designed to tax those rights or things in respect of which the whole value is brought into income".[227] On the contrary, it is submitted that the use of the word "value", rather than "fair market value" indicates that only the profit portion of the full fair market value of the item is to be brought into income. Further, there is no need to draw a distinction between cash basis businesses and those employing accrual accounting as is implied by the wording of the Interpretation Bulletin quoted above. Whatever accounting method is utilized by the taxpayer, what is to be brought into income is that which would have been brought into income had the taxpayer actually sold his entire inventory on one day. Similarly, the deductions permitted are those which would have been permitted in the normal course of business.

c. Reporting Choices

Let us assume, then, that the artist's unsold inventory does constitute a "right or thing" within the meaning of section 70(2). And

let us further assume that a value for that inventory has been determined. That value may be included as income in the artist's terminal return. That, however, is not the only choice open to the artist's executor. Section 70(2) provides that the deceased's legal representative may elect to file a separate return for the value of the "rights and things" "as if he had been another person". A third choice is introduced by section 70(3). Where a "right or thing" has been "transferred or distributed" to beneficiaries, the value is not income to the deceased. Instead, there is a deferral of tax until the beneficiary realizes or disposes of the property at which time the income is taxed in the beneficiary's hands.

There are certain situations in which it would be advantageous to include the value of the rights or things in the deceased's terminal return. For example, it is now possible to deduct a negative amount of income from rights or things from other sources of income and vice versa.[228] Formerly, amounts brought into income as a result of 70(2) were available for general averaging.

An advantage to using the "rights or things" election is that the separate return premits the legal representative to double up on personal deductions. For example, actual medical expenses may be deducted on one return and the standard medical deduction is still available for the other.[229] A second advantage is that subsection 159(5) provides that where the election to file a separate return is made, arrangements may be made with the Department for payment of tax in annual installments (with interest) over a period of ten years.

Suitable security must be provided. Finally, it is possible to divide up property between the decedent and his beneficiaries in a manner which will minimize tax. However, Revenue Canada takes the position that the decedent's legal representative must include all the "rights or things" being claimed by the decedent on one of the decedent's returns; it will not permit the decedent to divide them up between his terminal return and separate "rights or things" return.[230]

In considering the tax implications of the various choices with regard to "rights or things", the artist's legal representative must also bear in mind the tax position of the artist's beneficiaries. This involves two related issues: first, what will the recipient's cost basis in the works be, and, second, will the recipient take the property as inventory or as capital property. The conventional answer[231] is that where the appreciated inventory has been taxed pursuant to section 70(2) -- either with the artist's other income in his terminal return or in a separate return -- then the beneficiary takes the property at its fair market value at the time of its acquisition[232] and, unless the recipient is a "trader", may treat any subsequent realization of income from the sale of the property as on capital account. Where the beneficiary takes the property pursuant to a transfer under section 70(3) then the recipient has a cost basis equal to the cost basis in the property of the deceased taxpayer plus any expenses he incurred to acquire the property.[233] In this situation, Revenue Canada states that the recipient must report any subsequently realized income as business income, not capital gains.

The foregoing is a blend of statutory provisions and administrative policy. The provisions with respect to the cost basis are supported by specific sections of the Act as noted in the footnotes.[234]

The suggestion discussed above that the artist's appreciated inventory is not, in fact, caught by the "rights or things" provisions and is therefore not taxable at all has attractive implications for the beneficiary as well as for the artist's estate; since section 69(1.1)(b) would not apply, section 69(1)(c) would, and the beneficiary would receive the benefit of a substantial "bump".[235]

As noted above, it is generally assumed that, where the inventory has been taxed in the estate, the property can become capital property unless the recipient is a trader. It is also assumed that, where the property has been transferred pursuant to 70(3), it retains its character as inventory; income realized on its sale is on income account.[236]

The writer submits that the character of property is determined by the activities of its owner. Where a beneficiary receives an artwork through the distribution of assets of an estate and that beneficiary is not a dealer or trader in such works, the writer is aware of no requirement in the Act or the case law which would dictate that the property must remain inventory. Thus, it is submitted that a beneficiary/collector would always take the artwork on capital account --regardless of the manner of its taxation in the estate. As long as the new capital gains exemption remains, the beneficiary can then

realize up to $500,000 tax free on the eventual disposition of the property. Of course, there is no tax if there is no desposition -- the possibility of indefinite deferral has been mentioned previously.

In light of the foregoing, the writer would submit that there is a flexibility available to the legal representative of the unincorporated artist which is lost if the artist has incorporated. On the other hand, the advantages noted previously such as substantially reduced tax rates and the ability to transfer latent income tax free must be considered as well. The choice is a complicated one which must be made in the light of each artist's particular circumstances.

Footnotes to Chapter V:

181. Taken in its broadest sense, estate planning provides the focus for the bulk of tax literature. Thus it is necessary to restrict the present discussion to matters which have specific import for the visual artist; there are numerous estate planning techniques of general applicability which will not be discussed. The reader is referred to the many excellent materials available in the area. For accessibility and organization, the writer's preference is for the Canada Tax Planning Service, a three-volume losse leaf service published by Richard De Boo and edited by Arthur B. Drache, Q.C..

182. The matter of deductions available to the visual artist has been investigated in Chapter III.

183. For the 1985 tax year this would require the artist to have taxable income of more than $62,000 net of the deduction for the averaged amount.

184. Bradley, supra footnote 81. In graph 5.9, which sets out figures representing net artistic income (sum of income from sale of art and grants and prizes minus expenditures on materials, show costs, studio costs and dealer commissions), it appears that 75% of reporting artists fell below the following income amounts: for FT/O artists - $5,190; for FT/PT - $1,265; and for PT - $105.

185. The base amount is essentially 110% of the average income of the three preceding years, adjusted for an indexing factor.

186. Clause 110.4(1)(b)(i)(B)(II).

187. I. Weinstein v. M.N.R., (1966) 41 Tax ABC 253; 77 DTC 436.

188. H.L. Doane, "Discussion: Tax Problems of Small Business," 81 CR 342 at p. 354; H.J. Kellough and P.E. McQuillan, Taxation of Private Corporations and Their Shareholders, (Toronto: Canadian Tax Foundation, 1983) at pp. 27-77; K. Lahey, Corporate Taxation (Toronto: Emond Montgomery Publications Ltd., 1984) at p. 21; Canada Tax Planning Service, supra footnote 181.

189. Canadian materials which deal, briefly, with artists are: Milrad, supra footnote 35; Sanderson, supra footnote 68.

190. Queen & Metcalfe Carpark Ltd. v. M.N.R., [1973] CTC 810; 74 DTC 6007 (FCTD), holds that the act of incorporating creates a presumption of business purpose; thus, where the "expectation of profit" problem might arise the use of the corporation could tilt the scales in favour of the taxpayer. This advantage will be self-cancelling, however, as the "expectation of profit" test is only a problem where, in fact, there is no profit, and as noted in the text, the use of a corporation prevents the use of

losses as a deduction against other sources of income. And see also, Shapiro, supra footnote 59, at p. 924.

191. As we have seen, even here a corporation is not essential to create income splitting opportunities. Supra p. 38.

192. These comments are made without regard for the impact of provincial corporate tax rates which, of course, must also be considered. For example, Alberta has recently amended its corporate tax act to provide for a provincial manufacturing and processing deduction effective until March 31, 1990 which results in a complete provincial tax holiday for a corporation otherwise also entitled to the small business deduction. Alberta Corporate Income Tax Act, R.S.A.1980, c. A-17, section 22.1.

193. There are additional legal complications -- for example, the artist must be careful to document the assignment of his copyright interest in his works to his company. It has been suggested that there might be a problem with corporate ownership of copyright. J. Bernstein, "Investing in Art and Other Collectibles," 83 CR 124, at p. 1156.

194. There is, of course, always double taxation in the sense that profits are taxed on their recognition by a company and are taxed again on distribution to the shareholders. However, integration of the corporate and personal tax rates, through the use of the small business deduction and the dividend tax credit, has the effect of making the tax actually paid equal to the tax which would have been paid had the money been earned by the taxpayer without the interposition of the corporation. Once the small business deduction is no longer available, profits are taxed in the company at the highest marginal rate but the dividend tax credit only provides a partial credit for the corporate tax paid.

195. See discussion supra pp.110-113.

196. See discussion infra p.59 and notes thereon.

197. This distinction was successfully argued in the recent case Jodare Ltd. et al v. The Queen, [1986] CTC 250, 86 DTC 6054 (FCTD), presently under appeal.

198. In an interesting case, an oriental rug dealer was permitted capital gains treatment on some carpets which she alleged were her personal possessions -- notwithstanding that the evidence suggested that some of them were intermingled with the business inventory; L. Aryeh v. M.N.R., [1979] CTC 2215; 79 DTC 247 (TRB).

199. Lee Seldes, The Legacy of Mark Rothko, (Markham, Ontario: Penguin Books, 1974).

200. Bernstein, supra footnote 193.

201. Should that situation ever see legislated improvement, there is an excellent precedent in the agreement between Hans Hofmann and the Regents of University of California in which Mr. Hofmann transfered a partial interest in a number of works during his life and agreed to transfer a number more in his will in exchange for a permanent exhibit of his work at the university's gallery. Feldman and Weil, supra footnote 35, at p. 1101.

202. L.D. duBoff, Art Law in a Nutshell, (St. Paul: West Publishing, 1984) at p. 184.

203. Throughout the following discussion the words "appreciated inventory" have been used to refer to the unrealized profit component of the artist's unsold works.

204. Minister of Finance v. Mann Estate, [1972] 5 WWR 23 (BCSC), aff'd [1973] CTC 561 (CA), aff'd [1974] CTC 222 (SCC).

205. Estate of David Smith v. Commissioner of Internal Revenue, (1972) 57 T.C. 650 (U.S. Tax Court).

206. Ibid, at p. 657.

207. As will be seen shortly, Judge Tannenwald expressly stated that considerations other than "blockage" entered into his decision as well; therefore, it is not possible to ascribe any precise percentage to the effect of a notional bulk sale.

208. Feldman and Weil, supra footnote 35, at p. 879.

209. Untermeyer Estate v. A.G. of B.C., [1929] SCR 84; Corkings v. Collins, [1936] SCR 37; Henderson Estate v. M.N.R., Bank of N.Y. v. M.N.R., [1973] CTC 636; 73 DTC 5471 (FCTD).

210. Untermeyer Estate, ibid.

211. Henderson Estate, supra footnote 209.

212. Smith, supra footnote 205, at p. 658.

213. Ibid.

214. On this generally, see J.C. Bonbright, The Valuation of Property, 2 Vols., (New York: McGraw-Hill, 1937) and Ian R. Campbell, Editor, Canada Valuation Service (Don Mills: De Boo, looseleaf).

215. U. Mastronardi Estate v. The Queen, [1976] CTC 572 (FCTD), upheld on appeal [1977] CTC 355; 76 DTC 6306 and 77 DTC 5217.

216. W.R. Brunelle v. M.N.R., [1977] CTC 2506, 77 DTC 326 (TRB); The Queen v. National System of Baking of Alberta Ltd. [1978] CTC 30; 78 DTC 6018 (FCTD).

217. National System of Baking, ibid, at p. 38, 6024.

218. Holt v. Inland Revenue Commissioners, [1953] 2 All E.R. 1499 at 1501.

219. See discussion, infra at p.88, re suggestion that use of "value" in fact removes inventory from the class of "rights or things".

220. Interpretation Bulletin IT-212R, "Income of Deceased Persons - Rights or Things," August 10, 1981.

221. McNair, supra footnote 149, at p. 277; Milrad, supra footnote 35, at p. 172.

222. R.M. Wise, "Valuation and the Income Tax Act," (1981) 29 CTJ 626; Wise, "Fair Market Value Determinations -- A Few More Requirements," (1983) CTJ 337; Canada Valuation Service, supra footnote 214, chapter 7.

223. IT-212R, supra footnote 220, paragraph 2.

224. A.B. Davidson, "Income in Respect of A Decedent, What Is It, and What to Do About It," 74 CR 422.

225. Ibid, at p. 424.

226. Other writers who have argued this position are: Goodman, "Estate Planning -- Before and After Tax Reform," 2 Estate and Trusts Quarterly 313; McNair, supra footnote 149, at p. 46.

227. Davidson, supra footnote 224.

228. The use of losses from the deemed disposition of "rights or things" is a new administrative position taken by Revenue Canada in paragraph 5 of IT-212R. Formerly it was stated not to be permissible to have a negative amount from the deemed disposition under 70(2).

229. On this generally see Interpretation Bulletin IT-326 "Returns of Deceased as Another Person," June 21, 1976.

230. IT-212R, supra footnote 220, paragraph 20.

231. A.F. Sheppard, "Income Tax Planning," 76 CR 762.

232. Paragraph 69(1)(c).

233. Paragraph 69(1.1)(b).

234. An interesting situation arises when the beneficiary is a non-resident; it would appear that property transferred or distributed to a non-resident beneficiary pursuant to 70(3) escapes tax altogether. Goodman, supra footnote 226, at p. 313.

235. Davidson, supra footnote 224, at p.427; Goodman supra footnote 226, at p.316 and McNair, supra footnote 149, at p.47.

236. Sheppard, supra footnote 231, at p.762; Milrad, supra footnote 35, at p.172.

# CHAPTER VI

# REFORM

## A. INTRODUCTION

Before investigating and evaluating the suggestions which have been either proposed or implemented for the purpose of assisting visual artists, it is interesting to review the position taken by the Carter Commission and the Federal Cultural Policy Review Committee on the broader issue of preferential tax treatment for specific groups and, in particular, visual artists. We shall then turn to an examination of the specific issues which reoccur in all studies in the area and evaluate the government's response to those issues.

Although it did not address visual artists specifically, the Carter Commission was unequivocal in its opposition to special tax treatment of any group. In emphasizing the importance of equity in the design of a tax system the Commission proposed that "it should ... be a goal of the tax system to avoid tax concessions to particular industries and to particular kinds of income ... [S]uch tax concessions are always inequitable, are frequently inefficient, tend to distort the allocation of resources and erode the tax base".[237] If special concessions are to be implemented, the Commission stated that "they should be provided in a form that makes it possible to assess their costs, that is, revenue foregone, so that the concessions can be

appraised at periodic intervals. Therefore, generally speaking, subsidies should be used rather than tax concessions."[238]

That the government wishes to encourage the growth and development of the arts in Canada is, presumably, a position on which there is no disagreement in principle. What form that encouragement should take was a core issue before the Federal Cultural Policy Review Committee. In its report the Committee appeared to lean towards the Carter Commission's negative position on special concessions. In summarizing their response to the various proposals for tax reforms for artists, the writers concluded: "[the] problem, after all, is not one of excessive tax burdens, but rather of inadequate incomes. Tax concessions of this kind benefit chiefly those who have least need of them."[239] Thus the focus of the Applebaum-Hebert Report's specific recommendations was on government incentives to encourage the purchase of Canadian art by Canadians.[240] Its proposals follow the model suggested by Carter -- that special concessions be implemented only where they will have the effect of correcting an imperfection in the operation of the market, in this case the insufficient economic support for Canadian artists.

The Applebaum-Hebert Report did acknowledge, however, the argument that artists suffer under the application of the general rules and its Recommendation 12 proposed that the system be evaluated to insure that artists receive equitable treatment. This recommendation was really no more nor less than a general statement of the concerns previously

expressed by Mr. Disney in 1978 and the Canada Council in 1984. The suggestion was not that artists should be granted special status by legislation but rather that the Act and regulations thereunder be interpreted and applied in a manner which recognizes the particular realities of the visual artist's endeavors in the same manner and to the same degree that the Act is interpreted and applied with regard to the special realities of other businesses. As will be apparent in the following discussion of the three main areas of "reform", in the writer's view such an approach would not really constitute reform at all and certainly would not constitute the creation of a special class for artists. In the writer's view this does not, in fact, effect any change in the law at all. Nonetheless, implementation of Revenue's purported new policy decisions has the advantage of clarifying Revenue Canada's position and, hopefully, will eliminate some of the more unfortunate encounters between visual artists and Revenue Canada assessors.

## B. CONSIDERATION OF SPECIFIC ISSUES

Advocates of a better tax "break" for visual artists have focussed their attention on three areas: (1) the problems encountered by artists, both employed and self-employed in deducting their expenses/losses from other sources of income; (2) the problems encountered by artists in meeting the Act's requirements for inventory valuation and, more broadly, what is seen as a requirement to report income using the accrual method; and (3) the punishing effect of the

Act on charitable donations by artists of their own works. We shall review the reforms proposed in each of these areas by Mr. Disney in his report, by the Tax Sub-Committee in theirs, and by the present government. Also included is some critical commentary either on the proposals or, where indicated, on the new policies or legislation.

## 1. DEDUCTION OF EXPENSES/LOSSES

As we have seen, problems in deducting expenses incurred in the pursuit of artistic endeavors may arise as a result of three separate issues. First, the expenditure may be disallowed as having been made to acquire or replace a capital asset. Second, the deduction may be disallowed on the grounds that the artist is an employee and is therefore restricted to those limited deductions permitted by section 8. Finally, the deduction may be disallowed as having been a personal or living expense and not incurred for the purpose of earning income from a business or property as is required by paragraphs 18(1)(a) and 18(1)(h).

It is interesting to note that there has been a shift in what is perceived to be the most vexing problem in this area.[241] When Mr. Disney submitted his report to the Secretary of State in 1978, his attention was exclusively on the first problem. Thus, his recommendation in this area was as follows:[242]

> We therefore recommend strongly that the Income Tax Act be amended to provide for the deduction of expenses in computing income by performing and creative artists who are employees on the same basis

as would be permitted if they were self-employed.

In its July, 1984 report, however, the Tax Sub Committee's attention was drawn to the second problem and its recommendations in this area, all eight of them, center on the need to establish and apply criteria of professionalism which would constitute a preliminary hurdle for everyone seeking to deduct expenses incurred in the pursuit of artistic activities. In the Sub-Committee's view the application of such criteria would assist the authorities in distinguishing between those who pursue their artistic activities with a view towards profit and those whose interest is recreational. It was the Tax Sub-Committee's view that such criteria could be applied administratively, that is, that they need not be incorporated into the Act itself but rather that they should be incorporated into an Interpretation Bulletin in order that they would be available to both taxpayers and Revenue Canada officials.

If an artist were determined to be professional, then "all losses resulting from direct artistic or writing expenses [would] be fully deductible",[243] and, "indirect expenses normally carried by a taxpayer in any event [would] be deductible only to the point where they reduce revenue to nil."[244]

Thus, the Tax Sub-Committee's recommendations would involve a set of consecutive steps; first, the individual would have to be recognized by Revenue Canada officials as being a professional. This would be determined through the application of the proposed criteria to the individual's particular circumstances. Once the individual was

acknowledged by the Department to be a professional, all direct expenses incurred in pursuit of the artistic activity would be deductible even if that were to result in the creation of losses which were then deducted from other sources of income. However, the Tax Sub-Committee felt that these provisions were sufficiently generous to artists that some restriction on the deduction of losses was justified. Therefore, it proposed a distinction between two classes of expenses -- direct and indirect. Direct expenses are those which are "integral to artists' work and its marketing";[245] indirect expenses are those which "occupy that grey area of deductions between personal and business use" and are expenses which "would have been incurred in any event".[246] The Tax Sub-Committee proposed that these latter expenses be deducted last and that they be deductible only to the extent that they are absorbed by revenue from artistic activities. Beyond that, they would cease to be deductible.

The Tax Sub-Committee rejected out of hand the suggestion which arose from time to time before it that the restricted farm loss provisions contained in Section 31 of the Act be used as a model to deal with the difficult problem of artists' expenses and losses and for this it is to be commended.[247] However, in the writer's view there is a further lesson to be drawn from the government's experience with section 31 which the Committee unfortunately failed to uncover. That is that provisions, initially intended to be permissive, may backfire and result in harsh rather than beneficial treatment of the taxpaying class-which they were intended to assist. The fact is that section 31

was initially designed to permit a restricted deduction for losses incurred outside the taxpayer's chief source of income at a time when otherwise such losses were non-deductible.[248] That section 31 was initially permissive rather than punitive is a fact that has become buried in tax history; now the general view is that the restricted farm loss provisions were set up to stop "gentlman farmers" from "ripping off the system". It is not difficult to conceive that the distinction between direct and indirect expenses proposed by the Tax Sub-Committee could have a similar negative result.

Thus, it can be argued that what artists would gain with the Tax Sub-Committee's recommendations concerning "professionalism" as a test for deducting expenses, they might well lose with the introduction of the loss restictions. In the writer's view the only possible explanation for such a restriction must be found in the underlying premise which continues to plague artists: that is, that there are individuals who are attempting to gain unjustified deductions by camouflaging personal expenses as artistic business expenses.[249] The writer fails to understand why, having recognized that "the `art business' differs considerably from other businesses" and having, therefore, introduced administrative criteria which would distinguish professionals from amateurs, the Tax Sub-Committee should then prohibit even professionals from deducting indirect expenses which result in losses in excess of artistic revenue. Such a distinction would, moreover, penalize those artists who, in an attempt to economize, reduce expenses by integrating their personal and business activities. Conceivably an artist who rented studio space would be

permitted a deduction for a loss created by that rent where an artist who worked in a studio at home would be barred from deducting a loss created by such expenses as would result. This might well leave the artist with a home studio in a worse position than he was before such a "reform"!

A preferred solution to the problem would be to implement the criteria as proposed by the Tax Sub-Committee; however, once an artist's professional status were recognized then all his expenses/losses should be deductible as they would be were the artist in a more conventional line of work (but not farming).

This is the avenue of reform selected by the present government. In the Press Release issued in response to the Tax Sub-Committee's recommendations, the then Minister of National Revenue, Mr. Bussieres, stated that "[a]rtists and writers may need much more time to turn a profit than ordinary businesses and we will therefore take that into account in applying the test of whether there is a reasonable expectation of profit to determine whether they are entitled to deduct certain expenses."[250] Mr. Bussieres announced that Revenue Canada would adopt a set of guidelines in making the expectation of profit determination which guidelines parallel those put forward by the Tax Sub-Committee. One of those guidelines suggests that the type of expenses should be investigated as follows: "whether a substantial portion of expenses are applicable to research, promotion and direct cost of works or alternatively whether the expenses are primarily

those that would be expended irrespective of the taxpayer's art activities, e.g. office in home and auto expenses".[251] This guideline speaks to the concern implicit in the Tax Sub-Committees proposal regarding the deduction of direct and indirect expenses; however, the proposal wisely avoids drawing a distinction between such expenses for the purpose of deductibility.

As has been noted, the proposed guidelines have now been incorporated into an Interpretation Bulletin and hopefully this will provide some support for artists in their discussions with Revenue Canada. As well, this should result in some consistency of approach in assessing policy among the district offices. This codification of the guidelines to be considered in determining whether or not an artist is in business or is pursuing a hobby is the most significant contribution of the new Interpretation Bulletin. With the possible exception of the comments regarding the deduction of travel costs, it is the only portion of the Bulletin which may actually have the effect of a legislative change (depending upon how the courts view the results of the application of the guidelines); the rest of the Bulletin merely elucidates and comments upon the new amendments which are, in fact, self-explanatory.

## 2. ACCOUNTING PROBLEMS

In addressing the problem of inventory valuation, the Disney report observed that "the Department of National Revenue is now willing to accept as a matter of administrative policy that no fair market value should be ascribed to the uncommissioned and unsold work in

process".[252] The report continues; "[t]his policy does not appear to be known to assessors in all district offices in Canada, however, so that disputes sometimes still arise."[253] In this area Mr. Disney merely recommended that the Department issue an Interpretation Bulletin to clarify the Department's policy for both tax officials and taxpayers.

Mr. Disney's recommendation with respect to the cash/accrual problem is qualified. Essentially, he concludes that, once the question of inventory valuation has been dealt with, the (perceived) requirement to report using the accrual method of calculating income creates a problem for artists only in respect of their materials inventories. His recommendation is that artists be provided with special provisions with respect to the valuation of their materials but he concedes that this raises a definitional problem which must be dealt with by a suitable amendment to section 10 of the Act.[254]

On these points the Tax Sub-Committee was more assertive. Acknowledging that the purported administrative practice of valuing artists' inventories at nil (as was Disney's understanding) had never been implemented, the Committee recommended that "Revenue Canada be willing to assign a nil value to the inventory of professional visual artists". It further recommended that "consideration be given to statutory changes to permit artists to use the modified accrual system at their option."[255]

In Mr. Bussiere's immediate response to the Tax Sub-Committee's report there was no mention of either inventory valuation or the cash/accrual problem. Indeed, the government remains silent on the latter question to the time of writing. However, in his May 23, 1985 Budget, Mr. Wilson introduced a proposal to amend section 10 to allow artists to exclude the value of inventory in computing income. That amendment has now been enacted as noted infra.[256] The amendments contain additional provisions which require the consent of the Minister to revoke the election and a definition of "artistic endeavour."

As an indication that the government is concerned about the plight of struggling artists this amendment is to be applauded. However, the writer submits that, at best it is superfluous and, at worst, it may actually cause greater confusion. As noted in Interpretation Bulletin IT-473:[257]

> 4. Subsection 10(1) of the Act and section 1801 of the Regulations provide three alternative methods of valuing inventory. These are:
> (a) valuation at the lower of cost or fair market value for each item (or class of items if specific items are not readily distinguishable) in the inventory;
> (b) valuation of the entire inventory at cost;
> (c) Valuation of the entire inventory at fair market value.

Thus, if one accepts the argument of the Canada Council,[258] that the fair market value of a work is nil then the artist already has the election which the reform proposal purports to introduce. Secondly, the provision appears to apply only to "individuals" thus excluding incorporated artists. Thirdly in the attempt to solve one problem the Department has, perhaps, introduced another which is the problem of

determining who qualifies for a specific provision intended only for those in the "artistic business".

### 3. CHARITABLE DONATION BY ARTISTS OF THEIR OWN WORKS

As has been noted, it was formerly the case that the unwary or ill-advised artist might find himself penalized for contributing one of his own works to be auctioned off for a charitable cause. Although that is no longer the case (or need not be), there remains the fact that there is no incentive for an artist to contribute works to galleries or museums.

Mr. Disney's approach to this problem was an interesting one. The crux of his recommendation is that an artist be accorded the same tax treatment for the donation of his work as would be accorded a collector making the same donation. In his words:[259]

> An incentive to donation by visual artists would be provided at low overall revenue cost by deeming donated works which they have produced to be capital property for income tax purposes rather than inventory, having an adjusted cost base of $1,000 for each work of art. This would give them the flexibility of treatment that is available to collectors and they would receive some benefit (but only up to the actual fair market value of the work) for the donation of their time and creative skills.

The Tax Sub-Committee was vague in this area. Its recommendation was merely "that the tax system provide financial incentives for visual artists to donate their own works of art to charity".[260]

The government was initially silent on this question; with the May 23, 1985 Budget, however, Mr. Wilson purported to remove an obstacle to the donation by artists of their works. "The proposed change would allow an artist to value a gift from inventory at any amount not exceeding its fair market value. This amount will be used in determining the amount of the artist's income and the amount that qualifies as a charitable donations."[261]

This proposal has now been implemented and is reflected in subsection 110(2.3). However, its net effect is merely to remove the penal aspect noted in our earlier comments concerning artists' charitable donations of their own works; it does nothing to encourage the gifting by artists of their works.[262]

Even without the new $500,000 lifetime capital gains exemption, treating artists as collectors would provide a strong incentive to donate works of art. And, after the artist had exhausted the permitted exemption, there would still remain the attractive capital gains treatment. Finally, the provision would permit artists of significant stature to take advantage of the benefits of donating works which can be certified in accordance with the provisions of the Cultural Property Export and Import Act.[263] It is suggested that this is only area where special status can be justified by the cultural benefits which would entail.

Of interest in this area is the American experience:[264]

> Prior to January 1, 1970, the treatment of charitable gifts of art works was the same for artists, dealers and collectors. Within certain percentage limitations, they were each entitled to a charitable deduction equal to the fair market value of what they gave.
>
> The denial of this treatment to artists and dealers under the Tax Reform Act of 1969 was a compromise. In the months preceding its passage, there was considerable sentiment in Congress to do away with such deductions for everyone. The problem of valuing such gifts was complicated, abuses were suspected and, at least with respect to artists, there was a conceptual problem.
>
> An actor could not get a deduction if he devoted a week to performing in a worthy cause. Why should a painter be able to get a substantial deduction if he spent the same week making a painting and then gave it to the same worthy cause? ... Moreover, there was some doubling of the artist's deductions in that he would have already deducted his studio rent, materials, etc. as trade or business expenses. When the argument was over, the artist and dealer were reduced to deducting only their cost; collectors could continue to deduct fair market value.

The result of the tax reform legislation is described by Richard E. Oldenburg, Director of the Museum of Modern Art, as follows:[265]

> In the three-year period 1967-1969 immediately preceding the effective date of the Tax Reform Act of 1969, this Museum received from 97 artists, as gifts, 321 works of their own creation -- drawings, prints, paintings and works of sculpture. In the three-year period 1970-1972 immediately following the passage of the Tax Reform Act, the Museum received from 15 artists gifts of only 28 works, of which the majority were prints -- a decrease of almost 91 percent in the number of gifts.

As noted above, if the system were revised to permit the treatment of artists as collectors with respect to the donation of their works to charity, that revision would constitute a real change in the present law. In the writer's view such a tax expenditure could be easily

justified -- indeed, it is but an extension of the government's avowed policy as stated in the papers surrounding the implementation of the Cultural Property Import and Export Act.[266] The preservation and enrichment of Canada's cultural heritage was also the focus of the Federal Cultural Policy Review Committee's investigations.

C. CONCLUSION

Thus the government has implemented legislative changes which in the writer's view do little if anything to improve the situation for artists. With respect to the valuation of inventory at nil, it has been argued that artists have that election (without the qualifications introduced by the legislation) at present. With respect to the election regarding the value of a charitable donation by an artist of his own work, the new provision only removes what was clearly an inequitable result of the interaction of the deemed disposition provisions in 69(1)(c) and the limitation on charitable contributions in paragraph 110(1)(a). As was argued earlier, the same result could have been achieved had the artist sold the work to the charity for a nominal amount. Neither then, nor now, is there any incentive to the artist to contribute.

There is an irony in this result. The Tax Sub-Committee was concerned in its investigations to distinguish between administrative reforms, which it felt could be swiftly implemented, and legislative reforms, which it felt would be longer in coming and more cumbersome to effect.

What we have are superfluous legislative reforms, swiftly implemented, without as yet the formal adoption of the administrative reforms which are clearly necessary.

Since writing this conclusion, the government has published the new Interpretation Bulletin on Visual Artists to which reference has been made throughout this paper. The single significant item in the new IT Bulletin is the introduction of formally recognized guidelines for the purpose of determining whether an artist is a professional or a hobbyist. With its introduction it is necessary to modify the somewhat ascerbic critique of the preceeding paragraph. It may be that, for the most part, artists may now rest easy that their problems and concerns will be recognized in their dealings with Revenue Canada. We shall see.

Footnotes to Chapter VI:

237. Carter, supra footnote 21, Vol. II, p.11.

238. Ibid.

239. Federal Cultural Policy Review Committee, supra footnote 26, at p.84.

240. Ibid., at p. 85-86, 151.

241. This shift in emphasis might be partially accounted for in the fact that Revenue Canada had in 1983 implemented a computer search which brought up for investigation and consideration the files of all taxpayers who had deducted business losses from employment income. Of the 5,900 files studied approximately 400 were artists. Many of these artists were reassessed and their expense deductions were disallowed. Ibid., p. 7, and Perrin Beatty supra footnote 93. If there was a common refrain to the testimony before the Tax Sub-Committee it was that artists saw themselves as being sought out for harassment on this point by Revenue Canada officials.

242. Disney, supra footnote 8, at p.18.

243. Federal Cultural Policy Review Committee, supra footnote 26, Recommendation 11, at p. 81.

244. Ibid., Recommendation 12, at p. 82.

245. Tax Sub-Committee, supra footnote 16, at p. 13.

246. Ibid.

247. See discussion infra, at p.48.

248. McNair, supra footnote 149, at p. 123.

249. Johnson, supra footnote 5. Indeed, there is already a popular foundation for such a view; in the Summary of Briefs and Hearings, it is stated that: "Visual Arts Ontario suggested that there exists a lack of respect for the position or occupation of the visual artist in Canadian society. In the eyes of many, the artist is one who is always whining for more public financial assistance for projects of little practical value. He is seen as a rather self-indulgent individual working on the fringes of society." Federal Cultural Policy Review Committee, supra footnote 26, at p.15.

250. Press Release, June 27, 1984.

251. Ibid.

252. Disney, supra footnote 8, at p.26.

253. Ibid.

254. Ibid., at p. 27.

255. Tax Sub-Committee, supra footnote 16, at p.15. "Modified accrual" connotes an accounting procedure whereby fixed assets are capitalized; in all other respects income is calculated on a cash basis.

256. See supra footnote 167.

257. Interpretation Bulletin IT-473, "Inventory Valuation," March 27, 1981, as updated by special release, May 25, 1984.

258. See discussion supra at p.71.

259. Disney, supra footnote 8, at p.24.

260. Tax Sub-Committee, supra footnote 16, Recommendation 30, at p.32.

261. Budget Papers (Prentice-Hall, May 23, 1985), at p.58.

262. It should be noted that here, again, the proposal will not assist the incorporated artist.

263. S.C. 73-74, c. 50 as amended.

264. Feldman and Weil, supra footnote 35, at p. 821.

265. Ibid., at p.823.

266. Duncan Cameron, "An Introduction to the Cultural Property Export and Import Act" (Ottawa: Department of Communications, 1980).

## POSTSCRIPT

No federal statute touches the lives of so many Canadians as does the Income Tax Act. Yet the average Canadian does not rely upon the Act itself in preparing his return or in assessing the tax implications of business arrangements. Assuming he does not receive professional assistance (and, often, even if he does) his understanding of the Act and its implications for him will be formed exclusively from information received from the vast administrative bureaucratic apparatus which is Revenue Canada. This information may be in the form of an interpretation bulletin, an information circular, a pamphlet or guide, a press release, or, even, advice from an information officer. The taxpayer will rely upon the information he has received and will file, or arrange his affairs, accordingly. Subsequently, he may be told that the information he received was, simply, wrong.[267]

Most taxpayers would be astonished to discover that their reliance on Revenue Canada's information service provides them no protection before the courts.[268] However, in the words of Mr. Justice Cattanach, as he dismissed the argument that Revenue Canada should be bound by an incorrect statement of the law in one of its early information bulletins: "Estoppel is subject to the one general rule that it cannot override the law of the land."[269]

There can be no dispute regarding the fact that officials of Revenue Canada do not have the power to legislate delegated to them. Yet it is

evident that the gap between legislation and administrative policy can be impressively wide. This has been denied by Revenue Canada which, when attacked, often hides behind the statement that it only administers the Act; this was the favorite refrain of Mr. Bussieres during the fall and winter of 1983-83. In response to a question form Mr. John Crombie (MP-Rosedale) as to why artists were still being assessed under the old rules notwithstanding the establishment of the Tax Sub-Committee, Mr. Bussieres stated:[270]

> I may remind him, however, that any changes that should or could be made in the Income Tax Act are the responsibility of the Minister of Finance, so that when the Committee submits its report, it will be up to the Minister of Finance, if any changes are to be made in the Income Tax Act, to put such changes before the House, if the Minister so decides. The Honourable Member will agree that until such changes are tabled in the House and approved, we must administer the Income Tax Act in its present form.

However, in his press release[271] issued in response to the Report of the Tax Sub-Committee, Mr. Bussieres instituted precisely the new assessing policy which he had purported to be unable to implement without new legislation, viz:[272]

> Mr. Bussieres confirmed that Revenue Canada auditors will limit reassessments of artists and writers to a return under review and one immediately preceding year, although the law permits reassessments for four years.
> Mr. Bussieres said he agreed with the sub-committee that some reassessments going back to the third and fourth earlier year had taken by surprise artists who had been filing in good faith in the same manner over the years and usually with professional assistance.
> The Department will therefore initiate refunds of reassessed tax for the third and fourth years back in the relevant cases which can be identified among 400 returns by artists and writers audited in a

> special tax audit project involving some 5,900 self-employed taxpayers generally.

Thus, notwithstanding Revenue Canada's denials concerning its extensive discretionary powers, the truth is as stated by Mr. Arthur Drache in his comments before the Tax Sub-Committee:[273]

> I guess this is one of the points I come back to with regard to dealing with Revenue. I am forever hearing them say; we have to follow the law; we have no discretion. That is nonsense. Revenue assessors have an incredible amount of discretion. Nobody ever forces them to do anything. ... So the idea that they are forced to do something is a cop-out. They are never forced to do it. They adopt policies and then they apply policies. Just tell them to adopt a different policy and they could do it. Just like the inventory thing. No law. They apparently decided to do it, and then they decided not to do it. They were going to deal with Onley's travel expenses one way; then the Minister decides, you are not going to deal with it that way. Fine. There is no law. He did not make law in the first place; he did not change law in the second place. He simply indicated how he felt the assessment practice should go. No law.

Even though Revenue Canada policy is not law -- in many respects it might as well be. Few individuals have the temerity to involve themselves in financial arrangements which fall afoul of a stated policy, notwithstanding that they may be quite certain that the policy is incorrect as a statement of the law. A corollary is that few individuals will invest time and money in disputing an assessment where the money involved is relatively speaking, inconsequential.

The foregoing comments lead me to state that, were I to begin anew I would now elect to study the interpretation and application of the Act first, by the administrators in Revenue Canada, and second, by the courts. Generally, studies deal either exclusively with the

administrative aspects of the Act -- e.g., the P.C. Task Force Report, the Farlinger Review, or the legal -- e.g., most writings by tax professionals. Nowhere did I come across an investigation of the conflicts and inconsistencies which exist between the two. However, in the course of my research I ran across, again and again, examples of the disparity between the interpretation of the Act by administrators and by the courts. Some of these conflicts could be resolved relatively simply with administrative reforms -- such as those propounded by the Progressive Conservatives before their subsequent ascendence to power. However, many involve interesting administrative questions such as the extent of delegated responsibility under the Act and the lack of administrative remedies against Revenue Canada's officials and equally interesting questions concerning the construction of taxing statutes and the burden of proof in tax trials. Undoubtedly the Charter will play its role in the elucidation of some of these uncertain areas. This would certainly be a fascinating and fruitful area of examination.

Footnotes to postscript:

267. The P.C. Task Force Report contains the following anecdote:
> ... the Toronto Star on Wednesday, March 28, 1984, printed a front page story in which Revenue Canada's telephone advisors failed 40% of the questions put to them.

P.C. Task Force Report, (Ottawa: P.C. National Headquarters, April 8, 1984), p.59. And see: W.A. Gibbon v. The Queen, [1977] CTC 334; 77 DTC 5193 (FCTD).

268. The only exceptions to this statement are the advance rulings, for which the taxpayer has to pay, and which are binding upon Revenue Canada: but only for the individual taxpayer by whom the ruling was requested.

269. E.G. Stickel v. M.N.R., [1972] CTC 210 at 219; 72 DTC 6178 at p.6185.

270. House of Commons Debates, Vol. XXV, 1st Sess., 32nd Parl 32 Eliz. II, p. 28890; and see also House of Commons Debates, Vol. I, 2nd Sess., 32nd Parl. 32 Eliz. II, at pp. 36, 171 and 437 for similar exchanges.

271. The issue of legislation by press release was raised as a matter of concern by H.L. Doane in comments given at the 1981 Tax Conference. His stated concern was that Revenue Canada was relying increasingly upon news releases and public forums to disseminate its policies rather than formulating interpretation bulletins and information circulars. Doane, "Tax Problems of Small Business -- a Round Table Discussion," 81 CR 342 at 348.

272. Press release, June 27, 1984.

273. Tax Sub-Committee, supra footnote 16, 13:29.

BIBLIOGRAPHY

BOOKS

Arnold, Brian. Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes. Toronto: Canadian Tax Foundation, 1983.

Associated Councils of the Arts, The Association of the Bar of the City of New York, and Volunteer Lawyers for the Arts. The Visual Artist and the Law. Revised Edition. New York: Praeger, 1974.

Bonbright, James C. The Valuation of Property. 2 Vols. New York: McGraw-Hill, 1937.

Campbell, Ian R. Canada Valuation Service (looseleaf) Don Mills: De Boo, 1984.

Crawford, Tad. Legal Guide for the Visual Artist. New York: Hawthron Books, 1977.

Drache, Arthur B.C. Canadian Tax Treatment of Charities and Charitable Donations. Second Edition. Don Mills: De Boo, 1978.

--------. Canadian Tax Treatment of Charities and Charitable Donations. Second Edition. Don Mills: De Boo, 1978.

DuBoff, Leonard D. Art Law in a Nutshell. St. Paul: West Publishing, 1984.

Feldman, Franklin and Weil, Stephen E. Art Works: Law, Policy, Practice. New York: Practising Law Institute, 1974.

Grode, Susan A., Editor. The Visual Artist's Manual. New York: Doubleday & Company, 1984.

Harris, Edwin C. Canadian Income Taxation, 3rd Edition. Toronto: Butterworths, 1983.

Lahey, Kathleen. Corporate Taxation. Toronto: Emond Montgomery, 1984.

Lerner, Ralph E., Chairman. Representing Artists, Collectors and Dealers, 1985. New York: Practising Law Institute, 1985.

McKellough, H.J. and McQuillan, P.E. Taxation of Private Corporations and Their Shareholders. Toronto: Canadian Tax Foundation, 1983.

McNair, D.K. Taxation of Farmers and Fishermen. Toronto: DeBoo. 1980.

Milrad, Aaron and Agnew, Ella. The Art World. Toronto: Merritt, 1980.

Rosen, L.S. and Granof, M.H. Canadian Financial Accounting. Scarborough: Prentice-Hall. 1980.

Salyzyn, Vladimir. Taxation of Fluctuating Incomes in Canada. Fourth Edition. Don Mills: CCH Canadian Ltd. 1984.

Sanderson, Paul. Model Agreements for Visual Artists. Toronto: Canadian Artists' Representation Ontario, 1982.

-------. Musicians and the Law in Canada. Toronto: Carswell, 1985.

Seldes, Lee. The Legacy of Mark Rothko. Markham, Ontario: Penguin, 1974.

Simpson, Shane. The Visual Artist and the Law. Sydney: The Law Book Company, 1982.

ARTICLES

Arnold, Brian "Conversions of Property to and from Inventory: Tax Consequences." (1976) 24 CTJ 231.

Arnold, Brian J. "Taking Stock of Inventory." 81 CM 146.

"Art for Taxes Sake." Editorial, Globe and Mail. January 4, 1984, p.6.

Beghe, Renato. "The Artist, the Art Market and the Income Tax." (1973-74) 29 Tax Law Review 491.

Bernstein, Jack. "Investing in Art and Other Collectibles." 83 CR 124.

Conway, Garry. "Save the Arts: Recommended Changes." Arts West. July/August 1984, p. 12.

Couzin, Robert. "Business and Property Income." 81 CM 41.

Cronkwright, Glen E. "The Dilemma of Conformity: Tax and Financial Reporting -- A Perspective from the Private Sector." 81 CM 22.

Davidson, A.B. "Income in Respect of a Decedent, What it is, and What To Do About it." 74 CR 422.

Davidson, Donald L.H. "Advance Rulings and Interpretation Bulletins." 83 CR 795.

Drache, Arthur. "An Office of Home." 4 Canadian Taxpayer 152.

------. "Section 31: Follow Up." 5 Canadian Taxpayer 95.

------. "Taxman Puts Artist's Costs on Test." Financial Post. October 15, 1983, p.27.

Doane, H.L. "Tax Problems of Small Business -- A Round Table Discussion." 81 CR 342.

Durr, Pat. "Death and Taxes." Parallellogramme. Vol. 9, No. 3, Feb-March, 1984.

Fulford, Robert. "Paint by Numbers: Toni Onley's Commercial Success Attracted the Attention of Revenue Canada." Saturday Night. January 1984, p.5.

Goodman, Wolfe D. "Estate Planning -- Before and After Tax Reform." (1975) 2 Estates and Trusts Quarterly 313.

Jackett, W.R. "Computation of Business Profits for Tax Purposes." 81 CM 285.

Johnson, Bryan. "Arts and the Taxman." Globe and Mail. November 12, 1983, p.10.

Jones, Craig M. "Inter Vivos Trusts and the 21-Year Deemed Realization Rules." 84 CR 352.

Jones, Frank, D. "Benefits Under the Income Tax Act." (1967-68) 6 Alta L.R. 157.

Mackay, G. "Angry Artists against the Tax Man." Maclean's. December 19, 1983, p. 53.

McGregor, Gwyneth. "Reasonable Expectation of Profit." 5 Canadian Taxpayer 93.

Moore, Mavor. "The Tax Collector and the Man Who Came to Dinner." Globe and Mail. March 3, 1984, p.E5.

"Onley Still Mad at the Taxman." Vancouver Sun, March 27, 1984, p.B9.

Pape, Gordon. "Painted into a Corner." Financial Post Mag. June 1, 1984, p.64.

Prem, Stephanie. "Estate Planning for Artists and Collectors." Art Law Seminar. St.Paul, Hamline University School of Law, 1982.

Rennie, Richard D., Murphy, George J., and Vicq, Jack G. "The Judicial Approach to Private Business Valuation: An Empirical Inquiry into Canadian Tax Cases." (1982) 30 CTJ 389.

Reed, Robert C. "The Dilemma of Conformity: Tax and Financial Reporting -- A Perspective from Revenue Canada." 81 CM 1.

Rotenberg, Charles M. "What's Fair About Fair Market Value?" (1977-78) 4 Estates & Trusts Quarterly 352.

Shapiro, Roberta K. "The Tax Consequences of Barter Transactions and the Significance of `A Reasonable Expectation of Profit'." 82 CR 919.

Sheppard, A.F. "Income Tax Planning in the Administration of Estates." 76 CR 762.

Stacey, John A. "The Treatment of Losses." 83 CR 29.

"Tax Laws Called Threat to Innovative Art." Globe and Mail. November 8, 1983, p.20.

Wardlaw, J.J. "Taxation Aspects of a Farmer's Estate Arising on his Death." (1975) 2 Estates and Trusts Quarterly 200.

Wise, Richard M. "Valuation and the Income Tax Act." (1981) 29 CTJ 626,.

-------. "The V-Day Value of Publicly Traded Shares." (year) 28 CTJ 253.

CASES

No. 470 v. M.N.R. 18 Tax ABC 257; 58 DTC 29.

No. 686 v. M.N.R. 23 Tax ABC 376; 60 DTC 123.

Alexis Nihon Co. Ltd. v. M.N.R., 1969 Tax ABC 39; 69 DTC 53.

Aryeh, L. v. M.N.R., [1979] CTC 2215; 79 DTC 247 (TRB).

Blunt, E.J. v. M.N.R., 14 Tax ABC 299; 56 DTC 73.

Blunden, W.T. v. M.N.R., [1979] CTC 3079; 79 DTC 839 (TRB).

Booth, L.K. v. M.N.R., [1979] CTC 2654; 79 DTC 595 (TRB).

Braive, Charles L. v. M.N.R., [1981] CTC 2790; 81 DTC 748 (TRB).

Brandes, Ralph v. M.N.R., [1983] CTC 2187; 83 DTC 158 (TRB).

Brunelle, W.R. v. M.N.R., [1977] CTC 2506; 77 DTC 326 (TRB).

Chlumecky, J. v. M.N.R., 12 Tax ABC 317; 55 DTC 183.

Collins v. Hertfordshire County Council, (1947) K.B. 598.

Cork, J.A. v. M.N.R., [1981] CTC 2367; 81 DTC 346 (TRB).

Corkings v. Collins, [1936] SCR 37.

Dominion Taxicab Association v. M.N.R., [1954] SCR 82; 54 DTC 1020.

English, H.E. v. M.N.R., [1956] Tax ABC 87; 56 DTC 267.

Federal Farmers v. M.N.R., [1966] CTC 22; 66 DTC 5068 (Ex.Ct.).

Gibraltar Mines Ltd. v. The Queen, [1985] 1 CTC 116; 85 DTC 5085 (FCA).

Gibbon, W.A. v. The Queen, [1977] CTC 334; 77 DTC 5193 (FCTD).

de Grazia, Sebastian and Anna Maria de Grazia v. Commissioner of Internal Revenue, 21 TCM 1572 (1962).

Harris Steel Group, Inc. v. M.N.R., [1985] 1 CTC 181; 85 DTC 5140 (FCA).

Hailman, Estate of Johanna K.W., Peoples First National Bank & Trust Co., Exec. v. Commissioner of Internal Revenue, 17 TCM 812 (1958).

Henderson Estate v. M.N.R., Bank of N.Y. v. M.N.R., [1973] CTC 636; 73 DTC 5471 (FCTD).

Hill, G.O. v. M.N.R., 34 Tax ABC 169; 64 DTC 1.

Holt v. Inland Revenue Commissioners, [1953] 2 All E.R. 1499.

Jordare Ltd. et al v. M.N.R., [1986] CTC 250; 86 CTC 6054 (FCTD).

Johnston v. M.N.R., [1948] SCR 486; [1948] CTC 195; 3 DTC 1182.

Krause, Eric R. v. M.N.R., [1984] CTC 2040; 84 DTC 1031 (TCC).

Lafferty, R.C. v. M.N.R., [1969] Tax ABC 252; 69 DTC 198.

Lequillou, Jean-Yves v. M.N.R., [1984] CTC 2397; 84 DTC 1367 (TCC).

MacDonald, Donald B. v. M.N.R., [1974] CTC 2204; 74 DTC 1161.

Mastronardi Estate v. The Queen, [1976] CTC 572 (FCTD), upheld on appeal [1977] CTC 355; 76 DTC 6306 and 77 DTC 5217.

McPherson, Thomas Alexander v. M.N.R., NR-91 dated March 24, 1976.

Metropolitan Properties v. M.N.R., [1982] CTC 2254; 82 DTC 1258, reversed [1985] 1 CTC 169; 85 DTC 5128 (FCTD).

Merchant, E.F.A. v. M.N.R., [1982] CTC 2742; 82 DTC 1764 (TRB).

Minister of Finance v. Mann Estate, [1972] 5 WWR 23 (BCSC), aff'd [1973] CTC 561 (CA), aff'd [1974] CTC 222 (SCC).

M.N.R. v. Dominion Shuttle Co., Ltd., 72 C.S. 15 (SCC).

M.N.R. v. Godbout, [1981] CTC 3060; 82 DTC 1006 (TRB).

Moldowan, W. v. The Queen, [1977] CTC 310; 77 DTC 5213 (SCC).

Morrison v. C.I.R., (1928-33) 17 TC 325 (Scottish Court of Sessions).

Needham, A.R. v. M.N.R., [1974] CTC 2078; 74 DTC 1957 (TRB).

Olympia Floor & Wall Tile v. M.N.R., [1970] CTC 99; 70 DTC 6085 (Ex.Ct.).

Payette, Gaston C. v. M.N.R., [1978] CTC 2223; 78 DTC 1181 (TRB).

Pepper, D.R. v. M.N.R., 10 Tax ABC 67; 54 DTC 104.

Publishers Guild of Canada v. M.N.R., [1957] CTC 1; 57 DTC 1017 (Ex.Ct.).

Queen & Metcalfe Carpark Ltd. v. M.N.R., [1973] CTC 810; 74 DTC 6007 (FCTD).

The Queen v. Douglas C. Matthews, [1974] CTC 230; 28 DTC 6193 (FCTD).

The Queen v. National System of Baking of Alberta Ltd., [1978] CTC 30; 78 DTC 6018 (FCTD).

The Queen v. Paul E. Graham, [1985] 1 CTC 380; 85 DTC 5256 (FCA), on appeal from [1983] CTC 83; 83 DTC 5399 (FCTD).

The Queen v. York Marble, Tile and Terrazo Ltd., [1968] CTC 44; 68 DTC 5001 (SCC).

Schafer, M. v. M.N.R., [1981] CTC 2261; 81 DTC 226 (TRB).

Schip, R. v. M.N.R., [1983] CTC 2221; 83 DTC 190 (TRB).

Smith, Estate of David v. Commissioner of Internal Revenue, (1972) 57 T.C. 650 (U.S. Tax Court).

Stickel, E.G. v. M.N.R., [1972] CTC 210; 72 DTC 6178 (FCTD).

Taylor, A.W. v. M.N.R., [1979] CTC 2356, 79 DTC 331 (TRB).

Toolsie, J.V. v. M.N.R., [1980] CTC 2239; 80 DTC 1209 (TRB).

Turner, G.W. v. M.N.R., 1969 Tax ABC 180; 69 DTC 168.

Untermeyer Estate v. A.G. of B.C., [1929] SCR 84.

Walker v. M.N.R., [1951] CTC 334; 52 DTC 1001.

Weinstein, I. v. M.N.R., (1966) 41 Tax ABC 253; 77 DTC 436.

GOVERNMENT DOCUMENTS

Bradley, Iris M. Profiles of Visual Artists in Canada: 1978. Ottawa: Department of Communications.

Cameron, Duncan. "An Introduction to the Cultural Property Export and Import Act." Ottawa: Department of Communications, 1980.

Disney, Russell. Federal Tax Issues of Concern to the Arts Community in Canada: An Analysis. Ottawa: Department of Communications, 1978.

Federal Cultural Policy Review Committee. Report. Ottawa: Department of Communications, 1982.

----------. Summary of Briefs And Hearings. Ottawa: Department of Communications, 1982.

Report of the Royal Commission on Taxation. Volumes 1-4. Ottawa: Queen's Printer, 1966.

Statistics Canada: Education, Science and Culture Division. "Preliminary Statistics on Visual Artists." Statistics Canada Service Bulletin, Vol. 2, No. 3, 1979.

Statistics Canada. Taxation Statistics, Revenue Canada Taxation. Ottawa: Supply and Services, Canada. Published Annually.

Sub-Committee of the Standing Committee on Communications and Culture on The Taxation of Visual and Performing Artists and Writers. Minutes of Proceedings and Report. Ottawa: Department of Communications. 1984.

PAMPHLETS

Association of National Non-Profit Artists' Centres. "A Submission to the Federal Cultural Policy Review Committee." Toronto: March 1981.

Burnham, Mark D. and MacDowall, Cyndra. "Visual Artists & Part-Time Employment." Toronto: Canadian Artists' Representation Ontario. 1982.

Canadian Artists' Representation. "Taxation Information for Canadian Visual Artists." Winnipeg, 1977.

Canadian Conference of the Arts. "ARTS Bulletin - Special Edition on Taxation." Ottawa: September, 1983.

---------. "Taxation and the Arts, Brief to the Standing Committee on Communications and Culture." Ottawa: 13 February 1984.

Canada Council. "The Canadian Artist and the Income Tax Act." Ottawa: February, 1984.

Chartrand, Harry. "An Economic Impact Assessment of the Canadian Fine Arts." Ottawa: Canada Council, February, 1984.

Gouin, Judy. "The Cost of Earning as a Visual Artist." Toronto: Canadian Artists' Representation Ontario, 1980.

Report of the Progressive Conservative Task Force on Revenue Canada. Ottawa: Progressive Conservative National Headquarters, April, 1984.